**APPENDIX**

# Supreme Court of the United States

October Term, 1975

No. 75-353
No. 75-354
No. 75-355

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HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR.,
*Petitioners,*

*v.*

CHRIS-CRAFT INDUSTRIES, INC.,
*Respondent.*

---

THE FIRST BOSTON CORPORATION,
*Petitioner,*

*v.*

CHRIS-CRAFT INDUSTRIES, INC.,
*Respondent.*

---

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO AND DAVID W. WALLACE,
*Petitioners,*

*v.*

CHRIS-CRAFT INDUSTRIES, INC.,
*Respondent.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**PETITIONS FOR CERTIORARI FILED SEPTEMBER 5, 1975**
**CERTIORARI GRANTED APRIL 5, 1976**

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## Relevant Docket Entries

### United States District Court for the Southern District of New York

May 22, 1969—Filed complaint and issued summons.

July 23, 1969—Filed memorandum in support of Chris-Craft's motion for a pre. inj.

August 19, 1969—Filed Opinion #36107. Tenney, J. • • • For the foregoing reasons, plaintiff's motion is in all respects denied. So ordered (mailed notice).

September 4, 1969—Filed Notice of Appeal by Chris-Craft Industries, Inc. (mailed copy).

June 16, 1970—Filed true copy of order from the USCA: Order of District Court is affirmed and that the action be and it hereby is remanded to said District Court for further proceedings not inconsistent with the opinion of this court with costs to be taxed against the appellant. Clerk

June 22, 1970—Filed pltff's second amended complaint.

February 6, 1971—Trial Begun: Before Pollack, J.—Non-Jury Trial. Adjourned Sine Die.

March 9, 1971—Trial continued.

March 19, 1971—Trial continued and concluded—Defts' Bangor Punta, N. Salgo and D. Wallace rest and renew the motions made previously to dismiss the complaint—Decision Reserved. Defts First Boston, P. Miller and N. Bayard rest and renew motion to dismiss—Decision Reserved. Ptff. Chris-Craft moves to dismiss the counterclaim of Piper Aircraft—Decision Reserved. Pollack, J.

December 10, 1971—Filed Opinion #38096. The counterclaim of Piper against Chris-Craft is dismissed for failure to sustain the burden of proof thereof. The foregoing shall constitute the findings and conclusions required by F.R. Civ. P. 52(a). So ordered. Pollack, Jr. Judg, Ent. Clerk Ent. 12-1.

December 14, 1971—Filed plaintiff's notice of appeal to U.S.C.A.—Mailed copies.

June 15, 1973—Filed True Copy of Mandate from U.S.C.A. with copy of opinion. Ordered that judgment of District Court is reversed and that the action be and it is remanded to the District Court for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellee. No bill of costs or statement attached. Mansfield, Timbers and Gurfein, J. (to all attorneys).

April 22, 1974—Non-jury trial begun before Judge Pollack.

April 25, 1974—Trial continued and concluded. Decision reserved, Pollack J.

November 22, 1974—Filed Final Judgment and Decree #74,903—Ordered, etc. that Chris-Craft shall recover of defendants, Howard Piper, Thomas F. Piper, T. Piper, Jr., Bangor Punta Corp., Nicholas M. Salgo, David M. Wallace and The First Boston Corp., jointly and severally, the sum of $1,673,988, plus interest in the amount of $599,010.89 with costs to be taxed by the Clerk, Pollack, J. Judgment entered 11/25/74. Clerk.

November 25, 1974—Filed Plaintiff's notice of appeal to the U.S.C.A. from final judgment entered on 11-22-74. Mailed copies to Webster, Sheffield, Fleischmann (Hitchcock & Brookfield—Chadbourne, Parke, Whiteside & Wolff—Sullivan & Cromwell.





**United States Court of Appeals for the Second Circuit**

September 19, 1969—Argument heard (by: Lumbard, Waterman, Kaufman, CJJ)

November 6, 1969—Judgment Affirmed and Action remanded, Waterman, CJ

January 12, 1970—Filed order granting petition for rehearing in banc

April 28, 1970—On Petition for Rehearing in banc—Order affirmed and Remanded, Waterman, CJ

August 14, 1972—Argument heard (by: Mansfield, Timbers, CJJ & Gurfein, D.J.) & in 72-1064, 72-1120, 72-1140)

March 16, 1973—Judgment Affirmed in Part; reversed and remanded in part, Timbers, CJ

April 25, 1973—Filed order denying petitions for rehearing (Piper, Bangor Punta & First Boston) and in 72-1064, 72-1120, 72-1140 but amending opinion

April 25, 1973—Filed order denying petition for rehearing in banc (Piper)

April 25, 1973—Filed order denying petition for rehearing in banc (Bangor Punta)

April 25, 1973—Filed order denying petition for rehearing in banc (First Boston)

May 8, 1973—Filed order denying petition for rehearing (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

May 8, 1973—Filed order denying petition for rehearing in banc (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (First Boston Corporation)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (Bangor Punta Corporation, et al.)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (Howard Piper, et al.)

October 19, 1973—Filed certified copy of order of Supreme Court denying petition for writ of certiorari (S.E.C.) (& in 72-1064, 72-1120, 72-1140)

February 24, 1975—Argument heard (By: Mansfield, Oakes, Timbers, CJJ)

April 11, 1975—Judgment affirmed in part; reversed and vacated in part; and remanded with instructions, Timbers, CJ (& in 75-003)

May 15, 1975—Filed memorandum by S.E.C. in support of petition for rehearing of First Boston Corp.

May 15, 1975—Filed order granting leave to Securities Industry Association to file a brief *amicus curiae* in support of petition for rehearing or rehearing en banc of the First Boston Corp.; it is further ordered that the affidavit of Arthur L. Liman, Esq., sworn to April 28, 1975 also is ordered to be filed and distributed to the active judges of the Court

June 9, 1975—Filed order denying petition for rehearing (First Boston Corp.)

June 9, 1975—Filed order denying petition for rehearing en banc (First Boston Corp.)

June 9, 1975—Filed order denying petition for rehearing (Howard Piper)

June 9, 1975—Filed order denying petition for rehearing en banc (Howard Piper)

June 9, 1975—Filed order denying petition for rehearing (Bangor)





June 9, 1975—Filed order denying petition for rehearing en banc (Bangor)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (Bangor Punta)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (First Boston)

April 14, 1976—Filed certified copy of order from Supreme Court granting writ of certiorari (Piper)

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*Court of Appeals Opinion on Liability*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 805-08—September Term, 1971.

(Argued August 14, 1972 Decided March 16, 1973.)

Docket Nos. 72-1053, 72-1064, 72-1120, 72-1140

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DOCKET NO. 72-1064

CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

*Defendants-Appellees.*

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DOCKET NO. 72-1120

BANGOR PUNTA CORPORATION,

*Plaintiff-Appellant,*

v.

CHRIS-CRAFT INDUSTRIES, INC.,

*Defendant-Appellee.*

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DOCKET NOS. 72-1053 and 72-1140

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff-Appellant-Appellee,*

v.

BANGOR PUNTA CORPORATION,

*Defendant-Appellee-Appellant.*

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Before:

MANSFIELD and TIMBERS, *Circuit Judges,* and
GURFEIN, *District Judge.**

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Appeals from judgments entered after non-jury trials of three separate but related civil actions in the Southern District of New York, Milton Pollack, *District Judge,* involving alleged violations of the antifraud provisions of the federal securities laws in connection with the contest between Chris-Craft Industries, Inc. and Bangor Punta Corporation for control of Piper Aircraft Corporation.

Affirmed in part; reversed and remanded in part.

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ARTHUR L. LIMAN, New York, N.Y. (Stuart Robinowitz, Joseph J. Ackell, Jack C. Auspitz, Anthony M. Radice and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., on the brief), *for Chris-Craft Industries, Inc. (Plaintiff-Appellant in No. 72-1064; Defendant-Appellee in No. 72-1120).*

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* Of the United States District Court for the Southern District of New York, sitting by designation.



ZACHARY SHIMER, New York, N.Y. (Paul G. Pennoyer, Jr., Irene C. Warshauer and Chadbourne, Parke, Whiteside & Wolff, New York, N.Y., on the brief), *for Piper Aircraft Corporation, Howard Piper, Thomas F. Piper and William T. Piper, Jr. (Defendants-Appellees in No. 72-1064).*

JAMES V. RYAN, New York, N.Y. (William L. D. Barrett, C. Kenneth Shank, Jr. and Webster Sheffield Fleischmann Hitchcock & Brookfield, New York, N.Y., on the brief), *for Bangor Punta Corporation (Defendant-Appellee in No. 72-1604; Plaintiff-Appellant in No. 72-1120; Defendant-Appellee-Appellant in Nos. 72-1053 and 72-1140) and for Nicolas M. Salgo and David W. Wallace (Defendant-Appellees in No. 72-1064).*

JOHN F. ARNING, New York, N.Y. (Roger L. Waldman, Charles W. Sullivan, and Sullivan & Cromwell, New York, N.Y., on the brief), *for The First Boston Corporation, Paul L. Miller and Nicholas H. Bayard (Defendants-Appellees in No. 72-1064).*

ROBERT E. KUSHNER, Assistant General Counsel, SEC, Washington, D.C. (G. Bradford Cook, General Counsel, David Ferber, Solicitor, and James J. Sexton, Attorney, SEC, Washington, D.C., on the brief), *for Securities and Exchange Commission (amicus curiae in No. 72-1064; Plaintiff-Appellant-Appellee in Nos. 72-1053 and 72-1104).*

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TIMBERS, *Circuit Judge:*

## PRELIMINARY STATEMENT

These consolidated appeals present important questions, some of first impression, involving the antifraud provisions of the federal securities laws in their application to a contest for acquisition of a controlling stock interest in a target corporation. Among the questions presented are those involving the scope of liability and relief under Section 14(e) of the Securities Exchange Act of 1934 and the type of relief necessary, in an SEC enforcement proceeding, to effectuate the broad remedial purposes of the federal securities laws.

The appeals are from judgments entered after non-jury trials of three separate but related civil actions in the Southern District of New York before Milton Pollack, *District Judge.*

In *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064), Chris-Craft appeals from the district court's dismissal after trial of its complaint against all defendants, 337 F.Supp. 1128 (S.D.N.Y. 1971), essentially on the grounds that many of the alleged securities laws violations had not been proven, that those proven had not caused injury to Chris-Craft and that Chris-Craft had failed to prove its claim for damages. We reverse and remand.

In *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.* (No. 72-1120), Bangor Punta appeals from the district court's dismissal after trial of its complaint, 337 F.Supp. 1147 (S.D.N.Y. 1971), on the ground of insufficient evidence to support Bangor Punta's claims that Chris-Craft had violated the securities laws or that such violations had caused injury to Bangor Punta. We affirm.

In *SEC* v. *Bangor Punta Corporation* (Nos. 72-1053 and 72-1140), the SEC appeals from those provisions of the



district court's judgment after trial, 331 F.Supp. 1154 (S.D.N.Y. 1971), which denied a permanent injunction against further violations of the securities laws and which imposed a condition upon Bangor Punta's rescission offer to former Piper shareholders. On the SEC's appeal, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On Bangor Punta's cross-appeal, we affirm.

## I.

## EVENTS LEADING TO INSTANT LITIGATION

Before turning to the issues raised on appeal in each of the three actions, we shall set forth a narrative of the events, beginning in the latter part of 1968 and during 1969 in connection with the contest for control of Piper Aircraft Corporation, which culminated in the instant litigation. Facts having specific bearing upon the issues in each of the three appeals will be discussed in more detail in connection with our rulings below on those issues in each case.[1] Our task on these appeals has been greatly facilitated by Judge Pollack's detailed, comprehensive findings of fact, and particularly by his evaluation of the facts as found. While we disagree with certain of his conclusions, as will appear below, we take this occasion to com-

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1 **The facts are substantially undisputed.**

**We shall assume familiarity with the detailed statements of facts set forth in the prior reported opinions involving this contest for control of Piper. In addition to the three opinions of Judge Pollack referred to above (337 F.Supp. 1128, 337 F.Supp. 1147, 331 F.Supp. 1154), there was an earlier opinion by Judge Tenney denying Chris-Craft's motion for a preliminary injunction (303 F.Supp. 191 (S.D.N.Y. 1969)), and an en banc opinion by this Court affirming the denial of the preliminary injunction, indicating certain violations of the securities laws and remanding to the district court for further proceedings not inconsistent with this Court's opinion. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970) (en banc).**

mend him upon the clarity of his opinions in these complex cases.

Chris-Craft Industries, Inc. (CCI) is a Delaware corporation. It is a diversified manufacturer of recreational products. Its securities, common and preferred stock and convertible debentures, are traded on the New York Stock Exchange (NYSE).

Piper Aircraft Corporation (Piper) is a Pennsylvania corporation. It is one of the nation's leading manufacturers of light aircraft. Its 1,644,890 shares of issued and outstanding stock were traded (during periods relevant to these appeals) on the NYSE from October 1, 1968 to August 11, 1969 and then on the Philadelphia-Baltimore-Washington Stock Exchange. The three individual Piper defendants (referred to herein as the "Piper family") were officers and directors of Piper and owned about 325,000 of the 1,644,890 outstanding Piper shares.

Bangor Punta Corporation (BPC) is a Delaware corporation. It is a conglomerate with holdings in diversified fields. Its securities are traded on the NYSE. Defendants Nicolas M. Salgo and David W. Wallace are principal officers and directors of BPC.

The First Boston Corporation (First Boston) is a Massachusetts corporation. It is an investment banking firm and also a registered broker-dealer. In connection with the events involved herein, it served as investment adviser to Piper and as underwriter for BPC. Defendant Paul L. Miller is president of First Boston and defendant Nicholas H. Bayard is a vice president in its underwriting department.

In the latter part of 1968, CCI undertook a large financing program designed to produce excess cash that could be used primarily for acquisitions. On October 30, 1968, CCI filed a registration statement and preliminary prospectus for



an offering of 6% convertible debentures up to $26 million in principal amount. The offer was made to shareholders and executives of CCI. It was largely successful, producing over $25 million in excess cash. At about the same time, Herbert Siegel, CCI's president and chief executive officer, discussed with the Philadelphia National Bank the obtaining of a revolving line of credit of up to $15 million. Such credit was granted and was drawn upon in February 1969 when needed.

CCI made its first purchase of Piper stock on December 30, 1968.[2] The purchase totalling 5200 shares was made through a confidential numbered account at Mitchell, Hutchins & Co., Inc., a member of the NYSE and a registered broker-dealer retained primarily by institutional investors. Additional purchases of Piper stock were made through Mitchell, Hutchins shortly thereafter in 1969:

| | |
|---|---|
| January 3 | 36,100 shares (34,200 from Madison Fund at $54) |
| January 6 | 22,000 |
| January 7 | 700 |
| January 8 | 30,900 (all but 200 from Keystone Growth Fund) |

CCI also made market purchases of Piper stock in the following amounts through other brokers:

| | |
|---|---|
| January 14 | 3,700 shares |
| January 20 | 800 |
| January 21 | 3,200 |

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2 CCI as of this date apparently had not yet decided to seek a controlling interest in Piper. Mr. Siegel testified that he had decided to buy the 5200 shares only a few days in advance and that he had not yet determined that an attempt to take over Piper would be advisable. The Board of Directors of CCI did not openly discuss the acquisition of Piper until its January 23, 1969 board meeting.

On January 22, CCI negotiated the purchase of 101,100 shares of Piper stock from Technology Fund, Inc. at $65 per share. This brought its total holdings in Piper to over 200,000 shares, approximately 13% of the outstanding Piper shares.

Up to this point, CCI had not officially informed Piper of its extensive purchases of Piper stock, nor had a public announcement been made.[3] On the morning of January 23, Mr. Siegel telephoned Mr. W. T. Piper, Jr., then President of Piper, and informed him that CCI would be announcing that day a cash tender offer for the purchase of Piper stock and that CCI had tentative plans to acquire a majority shareholder interest in Piper. In a statement released to the press that day, CCI announced a cash tender offer beginning immediately and ending on February 3 for up to 300,000 shares of Piper at $65 per share. The price of Piper stock on the NYSE at the close of January 22 was $52.50. CCI also revealed in its press release of January 23 that it was purchasing the stock for investment with a view to control of Piper, but that it did not presently have any specific plan or proposal with respect to the future of Piper.

The first response of the Piper management (essentially the Piper family) to the tender offer was to call a meeting on January 23 of representatives of First Boston (Piper's investment adviser), Chadbourne, Parke, Whiteside and Wolff (Piper's legal counsel), and Arthur Young & Co. (Piper's auditors). The next day, January 24, the Piper family decided to oppose CCI's bid for control of Piper. First Boston was asked to contact other companies to

3 Section 13(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78m(d)(1) (1970), requires that certain reports be filed by a purchaser when he has acquired more than 10% of the outstanding stock of a company. CCI satisfied this requirement by filing a Schedule 13D with the SEC along with its tender offer materials.



solicit proposals which might be preferable to a CCI takeover. BPC was one of the companies contacted. It showed considerable interest. But Piper did not follow up at that time.

The Piper family's resistance to the CCI tender offer took several forms. On January 25, the Piper Board adopted a resolution that CCI's offer was not in the best interests of the Piper shareholders and decided that this resolution should be sent to them. Letters were sent out the same day asking Piper shareholders to delay accepting the CCI offer until the Piper management could adequately respond to it. This was followed by a letter dated January 27 over the signature of W. T. Piper, Jr.[4] The letter stated, among other things, that the Piper Board "has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders."

Also on January 25, Piper officers met with officers of Grumman Aircraft Engineering Corporation (Grumman) to discuss the sale of 300,000 unissued but authorized Piper shares to Grumman at $65 per share. An agreement was entered into on January 28 under which Grumman agreed to purchase 300,000 Piper shares at $65 per share; Piper agreed to seek approval from the NYSE for the listing of the new shares; and Grumman agreed to tender a check for $19,500,000 at a closing to be held within 3 days of the NYSE approval. The agreement was entered into with "the intention of Grumman and Piper to explore the desirability of a merger of their two corporations". Under the agreement, Grumman was given an option to put the shares back to Piper after six months at Grumman's cost plus 3½% interest per annum running from the closing

4 This letter was prepared by D. F. King & Co. It was reviewed by the Piper family, by its legal counsel and by Mr. Bayard of First Boston.

date. In order to guarantee the option, Piper was required to maintain the proceeds of the sale in a fund separate from its other assets and free of liens. A press release was issued by Piper on January 29 announcing that Grumman "has agreed to purchase" 300,000 shares of Piper subject to the approval of the Boards of both companies. The release further stated that the agreement was also conditioned on the shares being listed with the NYSE, on there being no material adverse change in Piper's business, and on there being no change in the management of Piper. A letter tracking the language of the release was sent to Piper shareholders on the same day. There was no mention of the "put" arrangement in either the press release or the letter to shareholders. The Grumman agreement was terminated by mutual consent on March 19 after the NYSE advised the parties that it would not list the new shares.

Returning to CCI's program for purchasing Piper stock, its tender offer resulted in its acquiring an additional 304,606 shares of Piper. This boosted CCI's total holdings[5] to 547,106 shares, or approximately 33% of the outstanding shares of Piper as of February 3. To obtain the additional 17% necessary for control, CCI decided to make an exchange offer. On February 14, the Board of CCI approved the making of an exchange offer without determining its terms. On February 27, CCI filed with the SEC an S-1 registration statement and a preliminary prospectus for an exchange offer to acquire a minimum of 80,000 and a maximum of 300,000 Piper shares. CCI issued a press release on May 7 announcing the specific package of CCI securities to be exchanged for Piper shares. First Boston

5 While the tender offer was outstanding, CCI continued to purchase Piper stock on the market. On January 24, 16,200 shares were purchased. Between January 27 and February 3, another 22,600 shares were purchased.



estimated that the package was worth $70-74 per Piper share. On May 12 and 16, the Board of CCI adopted resolutions approving the exchange offer and increased the value of the package by adding $10 cash.

Between March 18 and April 7, CCI had issued orders to Mitchell, Hutchins to continue purchases of Piper stock for CCI's account. CCI actually purchased 9100 shares while its exchange offer was being processed. On April 7, however, Mr. Siegel met with the SEC which warned him that such purchases violated Rule 10b-6 as the SEC interpreted it. Mr. Siegel informed the SEC that CCI would cancel all outstanding orders and it did.

In the meantime, the Piper management continued to search for an effective maneuver to defeat CCI. On March 22, Piper entered into an agreement with United States Concrete Pipe Company of Florida to acquire all the outstanding shares of Concrete Pipe in exchange for 320,000 authorized but unissued Piper shares. On the same day, Piper agreed to acquire 99.466% of the shares of Southply, Inc. in exchange for 149,199 authorized but unissued shares of Piper. Piper apparently hoped that, by increasing the number of Piper shares outstanding, CCI would find Piper less attractive. The NYSE refused to list the new shares because the Piper family had failed to obtain the approval of Piper shareholders for the deals. When Piper itself issued the stock certificates, an extremely unconventional procedure, the NYSE suspended trading in Piper stock beginning April 7 and initiated delisting procedures. Piper rescinded the agreements on April 14.

Going back for a moment to CCI's program for purchasing Piper stock, its tender offer between January 23 and February 3 had resulted in its bringing its total holdings of Piper shares to 547,106 or roughly one-third of Piper's outstanding shares (including those privately purchased). Pursuant to its February 27 exchange offer (which termi-

nated July 24), CCI acquired 39,826 additional Piper shares. And pursuant to its July 24 exchange offer (announced on May 7, approved by the CCI Board on May 12 and 16, and terminated on August 4), CCI acquired 112,089 additional Piper shares—thus bringing its total holdings of Piper shares to 668,295 or 41% of Piper's outstanding shares.

BPC's first contact with the contest for control of Piper came on January 24 when First Boston spoke to Nicolas M. Salgo, BPC's Chairman of the Board, about the possibility of a deal between Piper and BPC. Mr. Salgo showed some interest but Piper broke off contact until February 24 when there was a meeting of Piper and BPC representatives concerning a merger of the two companies. BPC officials demanded that the Piper family sell to BPC all its holdings in Piper, which amounted to 31% of the outstanding shares. The Piper family gave no answer at that time. Further meetings were held on April 18 and 20. The Piper family did not decide to sell until late April or early May.

On May 8, a formal agreement was entered into between BPC and the Piper family. BPC made a "limited exchange offer" of specified BPC stock, warrants, and debentures (valued by First Boston at $70-72 per Piper share), for the total Piper family holdings of Piper stock, 501,090 shares. BPC also promised to use its best efforts to acquire additional stock to bring its holdings up to more than 50% of the outstanding Piper stock by a "further exchange offer" of "Bangor Punta securities and/or cash having a value, in the written opinion of the First Boston Corporation, of $80 or more per Piper share". It was further agreed that if BPC were successful in gaining control of Piper, and if First Boston determined that the package of securities received by the Piper family were valued at less than $80 on the opening day of the general



exchange offer, the Piper family would be given stock and/or cash to make up the difference.

On May 8, a statement was released to the press by both Piper and BPC disclosing that BPC was acquiring the Piper family's stock holdings through an exchange offer for a package of BPC securities. The release contained a statement that BPC would offer to the remaining Piper shareholders a package of BPC securities to be valued in the judgment of First Boston "at not less than $80 per Piper share". This $80 valuation was repeated by David W. Wallace, President of BPC, to a reporter for the Wall Street Journal on May 16.

On May 26, the SEC brought an action against Piper and BPC in the District Court for the District of Columbia charging that the May 8 press release violated §5(c) of the Securities Act of 1933, 15 U.S.C. §77e(c) (1970), and Rule 135, 17 C.F.R. §230.135 (1972), in that the release constituted an offer to sell securities before any registration statement had been filed, the $80 valuation having overstepped the Rule 135 exemption (a contention with which our Court agreed in its earlier en banc decision, 426 F.2d at 574). Both defendants consented to a permanent injunction without admitting any of the allegations of the complaint.

On May 16, BPC filed with the NYSE and the SEC a Schedule 13D describing the May 8 agreement. On May 29, BPC filed an S-1 registration statement for both of the exchange offers, and also filed a preliminary prospectus for the "further exchange offer". The May 29 offering, described as a tentative offering, was as follows:

1 share of BPC common
Series C warrants expiring 3-31-81 to purchase 3.25 shares of BPC common at $55
$15 principal amount of new 5½% convertible subordinate debentures, due 1994, convertible at $55

While awaiting SEC action on the exchange offer, BPC negotiated cash purchases of a total of 120,200 shares of Piper stock in the following private transactions: On May 14, BPC purchased 78,600 Piper shares from Fund of Funds Proprietary Fund, Inc. in Nassau at $79.25 per share. On May 15, BPC purchased an additional 20,000 Piper shares for $74.25 per share from American Securities Corporation. On May 16, 20 and 23, in three separate transactions, BPC purchased from Bay Securities Corporation the following Piper shares at the prices indicated:

| | | |
|---|---|---|
| May 16 | 2,300 | $76 |
| | 700 | 75.95 |
| May 20 | 11,200 | 76.25 |
| May 23 | 2,200 | 76.37 |
| | 5,200 | 78.37 |

All these purchases were made in disregard of SEC Exchange Act Release No. 8595, issued May 5, 1969, announcing proposed Rule 10b-13. This Rule, when adopted, would specifically prohibit BPC's purchases because they were made during the pendency of an exchange offer for the purchased shares. The Release stated that "[t]his provision is, in effect, a codification of existing interpretations under Rule 10b-6."

The Piper family naturally supported the BPC exchange offer and took several steps to ensure its success. On June 4, a letter over the signature of W. T. Piper, Jr. was sent to all Piper shareholders urging them to read and study carefully the preliminary prospectus on the BPC exchange offer. Another shareholder letter was sent on June 20 extensively criticising the CCI exchange offer and suggesting that the offer "is not in your best interests". Finally, on July 25, a week after the BPC offer had become effective, W .T. Piper, Jr. sent another letter to shareholders strongly recommending the BPC offer; it stated that the Piper management had been impressed with the BPC management and operations and that a combination with BPC would be in the best interests of all shareholders.



BPC did not fix the final terms of its exchange package until July 18, the day it became effective. The final offer consisted of the following securities:

1.2 shares of BPC common
Warrants for 3.5 shares of BPC common
$31 principal amount of new 8¼% convertible subordinate debentures, due 1994, convertible at $55

On July 18, First Boston sent to BPC an opinion letter which valued the combination of BPC securities at not less than $80 per Piper share based on market and other conditions existing prior to the opening of business on that day. Neither the preliminary nor the final prospectus on the BPC exchange offer—nor the First Boston opinion letter—referred to BPC's negotiations with another company for the sale of the Bangor and Aroostook Railroad, a major asset of BPC, for $5 million, which was $13.5 million less than the amount at which it was carried on the books. We shall discuss this more fully below.

To summarize CCI's public offers, on January 23, CCI had made its first tender offer for 300,000 Piper shares. By February 3, these efforts, together with its negotiated purchases, had gained CCI approximately 33% of the then outstanding Piper shares. On February 27, CCI filed with the SEC a registration statement and proposed prospectus for an exchange offer for a minimum of 80,000, a maximum of 300,000, additional Piper shares; after the period of this exchange offer had been extended six times, it finally was withdrawn on July 24 when CCI failed to obtain the minimum 80,000 shares. Still another exchange offer was

announced by CCI on May 7, adding substantially more value to its earlier package; a new registration statement for this exchange offer was filed with the SEC on July 22; and a new prospectus was filed on July 24, the effective date of the offer.

The BPC exchange offer expired on July 29 with BPC acquiring 111,628 shares. CCI's second offer expired on August and produced 112,089 shares.

The contest for control was not yet over, however, because after the expiration of both offers CCI and BPC owned only 41% and 45%, respectively, of the outstanding Piper shares. CCI made additional purchases of 29,200 shares between August 12 and 18, and then virtually withdrew from the struggle. BPC, on the other hand, continued to purchase for cash on the NYSE until August 11, and then purchased on the PBWSE until September 5. By September 5, it had acquired another 100,614 shares, enough to achieve a majority stockholder position in Piper (839,306 shares or 51%).

CCI had lost the battle for control after investing more than $44 million—$38,295,238 in cash and $6,333,029 in other forms of consideration such as stocks and warrants.

## II.

## CHRIS-CRAFT INDUSTRIES, INC. v. PIPER AIRCRAFT CORPORATION, ET AL. (NO. 72-1064)

On May 22, 1969, while the contest for control of Piper was still being waged, CCI brought this action in the District Court for the Southern District of New York. The amended complaint alleged violations of Section 5(c) of the Securities Act of 1933, 15 U.S.C. §77e(c) (1970), and Rule 135 promulgated under the 1933 Act, 17 C.F.R. §230.135 (1972); it also alleged violations of Sections 9,



10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78i, 78j(b) and 78n(e) (1970), and Rules 10b-5 and 10b-6 promulgated under the 1934 Act, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1972). The complaint sought damages and equitable relief.

On July 22, CCI moved for a preliminary injunction to prevent BPC from gaining and exercising control of Piper. Judge Tenney denied CCI's motion for a preliminary injunction on the grounds that CCI had failed to establish either irreparable injury if the motion were denied or unlawful conduct on the part of BPC. 303 F.Supp. 191.

An expedited appeal from Tenney's order resulted in an en banc decision by this Court. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970). We held, in an opinion written by Judge Waterman, that a preliminary injunction was not required because BPC had stipulated upon oral argument not to effect a merger before the end of the litigation and we could perceive no other irreparable harm. We also ruled on the district court's alternative holding that the securities laws had not been violated, "for it [was] clear that this ruling below would determine the outcome of the trial on the merits." *Id.* at 573. We held that the May 8 press release violated §5(c) of the 1933 Act and Rule 135;[6] and that BPC's cash purchases of large blocks of Piper stock in May violated Rule 10b-6, but we made no determination whether the latter transactions were exempt under Rule 10b-6(a)(3)(2), which we discuss more fully at pages 4959-4963, *infra*. We remanded to the district court for proceedings not inconsistent with our opinion.

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6 The release was an "offer to sell" because it contained a statement of value and it was unlawfully issued prior to the filing of a registration statement.

On remand, CCI limited its claim for relief to damages, foregoing any claim for equitable relief.[6a] After trial on the merits before Judge Pollack, the district court filed an opinion. 337 F.Supp. 1128. The court found no merit in CCI's contentions that the Piper management misled the public by its January 23 letter which stated that CCI's cash tender offer was "inadequate", that the announcement of the Grumman agreement was deceptive because it failed to disclose the "put" provision, or that other January communications were misleading. The court rejected CCI's claim that the May 8 release was inaccurate, if "taken in its own terms". It found that, although the release violated §5(c) of the 1933 Act, CCI had failed to show that this violation caused it to lose the contest or to increase unnecessarily its cost of acquiring Piper stock. The court held that the BPC registration statement for its exchange offer was "unintentionally in error" in failing to disclose the negotiations for the sale of the Bangor and Aroostook Railroad, but that CCI had failed to prove the scienter and causal effect necessary for a Rule 10b-5 or §14(e) cause of action for damages brought by a party in the position of CCI. The court held that BPC's May cash purchases had violated Rule 10b-6 and were not exempt, but that the violations did not cause injury to CCI. The court faulted Piper for failing to disclose certain matters in its annual statements and other reports, but decided that CCI was not in a position to complain. With regard to the claims against First Boston, the court concluded that First Boston had not engaged in any conduct which operated as a fraud upon CCI or the public shareholders of Piper and that it should not be held liable for the actions of its client. The court held that Piper had failed to prove its counterclaim

6a CCI also amended its complaint to allege violations of §16 of the 1934 Act, 15 U.S.C. §78p (1970).



against CCI by not adequately showing violations of the law or that such violations were related to injury sustained by Piper. The court dismissed CCI's complaint against the corporate defendants and against each of the individual defendants.[7]

For the reasons stated below, we reverse and remand with directions to grant appropriate relief.

## (A) Function of Private Action for Damages in Enforcement of Federal Securities Laws

In order better to understand our rulings on the issues raised on this appeal—including our disagreement with the district court on certain issues—we believe it may be helpful briefly to delineate the proper function of the private action for damages in the overall pattern of enforcement of the federal securities laws.

This matter is squarely raised by the following observation by the district court in ruling on CCI's claims of violations of the antifraud provisions of the securities laws:

> "In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public interest in the purity of the registration process. This role has already been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them." 337 F.Supp. at 1139.

The SEC of course has been entrusted—by the statutes and implementing decisions—with the primary responsibility of protecting the public interest under the federal secu-

7 On appeal, CCI does not claim damages for BPC's violation of §5(c) of the 1933 Act, and it has dropped its claim that Piper directly deceived CCI as a purchaser of Piper shares by false and misleading statements in Piper's financial and other reports.

Piper has not appealed from the dismissal of its counterclaim.

rities laws. But the Supreme Court, as well as other federal courts including our own, have recognized that vigorous enforcement of the federal securities laws, particularly the antifraud provisions, can be accomplished effectively only when implemented by private damage actions. In *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), the Supreme Court emphasized that private actions provide "a necessary supplement to Commission action" and that "the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement" of the securities laws. 377 U.S. at 432. See *Fischman* v. *Raytheon Mfg. Co.,* 188 F.2d 783 (2 Cir. 1951); *Speed* v. *Transamerica Corp.,* 235 F.2d 369 (3 Cir. 1956).

This policy of vigorous enforcement through private litigation has been the instrument for forging many salutary developments in the securities fraud area, including a broadening of standing to sue and a relaxation of the elements of proof in a private action. A private right of action for damages has been implied for purchasers or sellers defrauded in violation of Rule 10b-5. *Kardon* v. *National Gypsum Co.,* 69 F.Supp. 512, 513-14 (E.D.Pa. 1946). Shareholders deceived by misleading proxy solicitations have been held to have a cause of action under §14(a) of the 1934 Act, 15 U.S.C. §78n(a) (1970). *J. I. Case Co.* v. *Borak, supra.* The scienter requirement in a Rule 10b-5 private damage action appears to have been reduced to a knowledge of falsity or reckless disregard for the truth standard by our decisions in *Heit* v. *Weitzen,* 402 F.2d 909, 914 (2 Cir. 1968), *cert. denied,* 395 U.S. 903 (1969), and *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290-91 (2 Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), "to insure the maintenance of fair and honest markets in . . . [securities] transactions." Section 2 of the 1934 Act, 15 U.S.C. §78b (1970). The reliance standard also has been relaxed under certain circumstances; for example, if a material omission or misstatement is proven, a presumption may be raised that the plaintiff relied on the deception to his detriment. See *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153-54 (1972) (Rule 10b-5 violation); *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 385 (1970) (§14(a) violation). These are merely examples of innovations that have been prompted in substantial part by a uniform policy of encouraging vigorous enforcement of the securities laws through private litigation.



To understand the indispensability of private actions in the securities area, and the necessity for facilitating such litigation, it may be illuminating to focus upon the reasons Congress enacted the antifraud and antimanipulation provisions of the statutes. Obviously Congress was concerned about the plight of the average public investor who is at a serious disadvantage in dealing with persons possessing superior knowledge, skill and resources. But the public in the role of investor is only part of the picture. The integrity and efficiency of the securities markets are even more important since our entire economy is dependent upon these markets. The securities market performs the essential function of assessing the value that society places upon the efforts of a particular enterprise so that society can obtain the maximum amount of its preferred goods and services that our resources can produce. This function can be performed effectively only if the delicately calibrated balance of factors affecting demand and supply are allowed to have their impact upon the market place through an unrestricted flow of information and funds. See Crossland & James, *The Gods of the Marketplace: An Examination of the Regulation of the Securities Business,* 48 B.U.L. Rev. 515 (1968). The securities laws seek to prevent restrictions which distort the market's estimate of value. Considering the weighty interests at stake, Congress and the courts justifiably have outlawed

all unfair and deceptive practices related to the trading of securities and have encouraged private damage actions to implement the enforcement of the federal securities laws.[8]

(B) Violations of Antifraud Provisions of Section 14(e) of 1934 Act

We turn now to one of the key issues on these appeals: CCI's claim that each of the defendants violated Section 14(e) of the Securities Exchange Act of 1934. We hold that they did.

We shall discuss seriatum with respect to this claim each of the subordinate issues as briefed and argued by the parties, namely, (1) standing of CCI to sue for damages, (2) defendants' violations of Section 14(e), and (3) causation. Then, after discussing CCI's further claim of violations of Rule 10b-6, we shall take up the form of relief to be granted.

(1) *Standing of CCI to Sue for Damages*

CCI claims that defendants violated Rule 10b-5 or §14(e) when, during the pendency of CCI's attempt to take over Piper, BPC and Piper issued improper and misleading press releases, BPC filed an exchange offer registration statement with material omissions, and the Piper family sent out shareholder letters with material omissions and

8 Discernment must be exercised in determining whether a particular violation of an antifraud provision brings into play the policy of vigorous enforcement with all its effects. The Supreme Court's recent decision in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 11-13 (1971), indicates that a Rule 10b-5 cause of action may be stated even though the fact that a security somehow was involved in the underlying transaction is otherwise insignificant. In such cases, although there may have been a securities law violation, the harm caused by the violation may not be regarded as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud.



misstatements. All the alleged violations relate either to a cash tender offer or to an exchange offer the purpose of which was to secure for the offeror a majority shareholder position in the target corporation.

Defendants contend that CCI lacks standing to complain of their alleged violations of Rule 10b-5 or §14(e).

The district court found it unnecessary to decide whether CCI had standing under Rule 10b-5 because there was a failure to show causation; and it found that it was "unnecessary to decide whether §14(e) may be separately invoked by one competitor for corporate control against another" since "our 10b-5 conclusions are dispositive of the issues as raised under Section 14(e)". 337 F.Supp. at 1134 and 1140.

We hold that CCI does have standing under §14(e) to sue defendants for damages. Our holding is based on the statute itself and such decisional law as there is that has touched on the question.

Section 14(e) of the Exchange Act, 15 U.S.C. §78n(e) (1970), provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

The Senate Report which accompanied proposed §14(e) indicates clearly—more specifically than does Rule 10b-5[9]—

9 Rule 10b-5 under the 1934 Act, 17 C.F.R. §240.10b-5 (1972), provides:

"It shall be unlawful for any person, directly or indirectly, by

that §14(e) was intended to make applicable to a tender offer the long established antifraud proscriptions of the federal securities laws:

> "Proposed subsection (e) would prohibit any misstatement or omission of a material fact, or any fraudulent or manipulative acts or practices, in connection with any tender offer, whether for cash, securities or other consideration, or in connection with any solicitation of security holders in opposition to or in favor of any tender offer. This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." S. Rep. No. 510, 90th Cong., 2d Sess. (1968), quoted in U.S. Code Cong. & Admin. News 2811, 2821 (1968).

See also *H. K. Porter Co.* v. *Nicholson File Co.*, —— F.Supp. ——, —— (D.R.I. 1972), 4 CCH Fed. Sec. L.Rep. ¶93,703, at 93,079-81 (Nov. 30, 1972).

Section 14(e) is especially appropriate where, as in the instant case, the tender offer, in connection with which fraud is charged, was made with a view to obtaining control of a target company. The Williams Act of 1968, of which §14(e) is a part, was enacted to control what has become

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the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."



an increasingly popular method of corporate acquisition—obtaining a majority of a corporation's stock rather than its assets. See Mundheim, *Tender Offers*, 2 Rev. of Securities Reg. 953 (1969). The Act added to §13 of the 1933 Act subsections (d) and (e), which require tender offer disclosures similar to those required for issuance of new securities. Section 14(e) provides for openness and truthfulness in the solicitation of shares through tender offers and in the opposition to such solicitation.

Although the fraudulent acts involved in the instant case literally are proscribed by Rule 10b-5, we conclude that §14(e) is the antifraud provision which more appropriately provides the basis for CCI's standing to sue here. It therefore is unnecessary for us to decide whether CCI has standing to sue under §10(b) and Rule 10b-5.

A corporation in the position of CCI undoubtedly has standing to sue in a constitutional sense on the basis of the illegal acts alleged in the instant action.[10] Those who

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10 The issue of standing to which we address ourselves is whether CCI is an appropriate party to be seeking relief on account of defendants' illegal conduct. As stated in *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), a threshold question is presented by the provision in Article III, Section 2, of the United States Constitution, limiting federal judicial power to cases and controversies:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . .'"

While a personal stake in the outcome meets the Article III requirement, a court must take into account other considerations before deciding that a plaintiff has standing to sue.

In the absence of a specific provision in a federal statute authorizing suit, the Constitution requires that we analyze the statute to ascertain whether a federal cause of action can be derived from it in favor of the plaintiff. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Depending on the statute, Congress may have intended, for any number of reasons, that only certain persons should be entitled to sue thereunder, and the plaintiff may not be one of them. See *Birnbaum*

make tender offers have an economic interest in restricting their opponents to fair conduct, for fear that they themselves might incur injury because of practices which they are legally barred from meeting in kind. CCI's allegations indicate that it has "a personal stake in the outcome of the controversy", *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), because it has suffered a pecuniary loss directly attributable to the defendants' acts. See generally *Flast* v. *Cohen*, 392 U.S. 83, 94-101 (1968). Thus, under the requirements of the cases or controversies clause of the United States Constitution, CCI is an appropriate party to complain of such illegal acts.

We must also decide, however, whether CCI has a private federal right of action under §14(e) against each of the defendants and, more specifically, whether it has a claim for compensatory damages.[11] Cf. *Dyer* v. *Eastern*

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v. *Newport Steel Corp.*, 193 F.2d 461 (2 Cir.), *cert. denied*, 343 U.S. 956 (1952). On the other hand, Congress may have authorized the plaintiff to bring suit but limited the type of relief to which he is entitled. In short, the Constitution or statutory scheme enacted by Congress should be closely examined to determine whether the particular action brought by the plaintiff is explicitly or implicitly authorized.

The question whether a right of action or claim for relief exists under federal law is conceptually different from the *Flast* question. While attempting to make clear which concept we are discussing, we nevertheless shall refer to both as questions of "standing" since that is the term used in our prior decisions referring to §14(e). See, e.g., *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n. 1 (2 Cir. 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2 Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Electric Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 944-46, 948 (2 Cir. 1969).

11 A party with a sufficient economic or legal interest at stake conceivably might be permitted to bring an action to vindicate the public interest. That is, although his own interest was not intended to be protected by the statute, he might be allowed to sue, because of his own economic interest in the result, on behalf of those whose interests were to be protected. Cf. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); *Mutual Shares* v. *Genesco*, 384 F.2d 540, 543-46 (2 Cir. 1967). But in such a suit by a "private attorney general", compensatory damages normally would be improper relief, although punitive damages might be permitted.



*Trust and Banking Co.*, 336 F.Supp. 890, 913-14 (D.Maine 1971). The statute is silent as to a private remedy. In deciding this issue, however, we are not writing from a clean slate. Our Court has spoken on the issue on at least four previous occasions. In *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41, 944-46 (2 Cir. 1969), our holding on the merits made it unnecesssary for us to reach a decision on the standing question, but we did indicate that a target corporation and nontendering shareholders could bring an action for a preliminary injunction under §14(e) against an offeror charged with wrongdoing. In *Butler Aviation International, Inc.* v. *Comprehensive Designers Inc.*, 425 F.2d 842, 843 n. 1 (2 Cir. 1970), a target corporation sought a preliminary injunction and we expressly held that standing existed under §14(e), at least as to the misstatements in the anual report. See also *Susquehanna Corp.* v. *Pan American Sulphur Co.*, 423 F.2d 1075 (5 Cir. 1970). In *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), after holding that a tender offeror had a Rule 10b-5 claim for relief against a target corporation under the "forced seller" principle, we went on to say that:

> "The amendment to the Act adding section 14(e) (15 U.S.C. §78n(e)), . . . should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is Crane, in the position of a forced seller." 419 F.2d at 798-99.

See also *H. K. Porter Co.* v. *Nicholson File Co.*, *supra*, 4 CCH Fed.Sec.L.Rep. at 93,079-81. In upholding the dis-

missal of a Rule 10b-5 claim in another action brought by an offeror against a target corporation, we suggested that standing might be provided by §14(e) although the 1968 amendment is an indication that "there was no standing to sue under Rule 10b-5 by either the tender offeror or by the target corporation". *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2 Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

While we have not heretofore squarely held that a private right of action for damages can be implied from §14(e) in favor of a party in CCI's position, we have indicated that such an implied right of action would be reasonable. Section 14(e) prohibits, as stated above, material omissions and misstatements in communications favoring or *opposing* tender offers. Under well recognized common law principles, interference with a "prospective advantage", such as the opportunity to purchase property, gives rise to a cause of action in the person injured where the means of interference adopted alone is unlawful, even though the purpose in itself may be justifiable. Prosser & Smith, Cases and Materials on Torts 1131-52 (1967). CCI therefore probably could state a claim for relief in most state courts against each of the defendants for tortious interference. Through unlawful and deceptive practices, they allegedly have denied CCI a fair opportunity to succeed in its tender offers. We will not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act. See *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. Pa. 1946).

We previously have noted, referring to §14(e), that "[t]he legislative history of the 1968 amendment demonstrates that the focus of legislative interest was on the public shareholder; Congress wanted to ensure that he had



the benefit of a full statement from the offeror, with a chance for 'incumbent management' to 'explain its position publicly', if so disposed, H.R. Rep. No. 1711, *supra*, at 2, U.S. Code Cong. & Adm. News at p. 2998." *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 945; *Susquehanna Corp.* v. *Pan American Sulphur Co.*, *supra*, 423 F.2d at 1085. The general objective surely is to encourage extensive and accurate disclosure of information relevant to a tender offer. The Supreme Court made it clear in *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432-33, that, in dealing with controversies involving the securities laws, we should not be reluctant to imply a private right of action when to do so will further the general objective of the statute involved. We can conceive of no more effective means of furthering the general objective of §14(e) than to grant a victim of violations of the statute standing to sue for damages. CCI is such a victim, as recognized by common law tort principles. A party in its position is especially likely to vindicate the wrong inflicted upon it. Particularly in light of the enforcement rationale of *Borak*, we believe it is both necessary and appropriate that CCI should be granted standing to sue for damages.

In enacting §14(e), while Congress did not explicitly state that shareholders of a target company are not the only persons entitled to the protection of the securities laws from fraudulent misrepresentations, it is a fair inference that a broader standing was intended. Since Rule 10b-5 covers all types of exchange offers, the major contribution provided by §14(e) would appear to be a broader standing to sue—accorded both to the offeror and to the opposition—based on fraudulent securities transactions. See *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 102 (7 Cir. 1970); *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890, 914 (D. Maine 1971). In *Electronic Specialty Co.* v.

*International Controls Corp., supra*, 409 F.2d at 940-41, we commented on the impact of §14(e):

> "In effect this applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law."

While Judge Friendly's opinion in *Electronic Specialty* is not dispositive, its holding that the target company may sue goes some distance toward saying that contestants may also sue. Cf. *Iroquois Industries, Inc.* v. *Syracuse China Corp., supra*, 417 F.2d at 969-70.

Our holding on the standing of CCI to sue for damages may be summarized as follows. The statutory language of §14(e) is silent on standing; it neither confers nor excludes standing with respect to one in the position of CCI. As a distinguished commentator said years ago, in such a situation there is no need to try to discover "supposed legislative intent"; [w]hether his offenses shall have any other legal consequence has not been passed on one way or the other as a question of legislative intent, but is left to be determined by the rules of law." Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 320 (1914). Under common law tort principles, we hold that a claim for relief under federal law is stated where, as here, a defeated contestant for control has been put in a minority shareholder position because of the wrongdoing of its opponent and the margin of victory is only 7%. CCI has shown that it had a reasonable chance of obtaining control of Piper, but lost the opportunity because its opponent gained control through means illegal under federal law. This is a case of first impression with respect to the right of a tender offeror to claim damages for statutory violations by his adversary. And our holding is



premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control.

We hold that CCI has a right of action for damages against all defendants for violations of §14(e).[12]

(2) *Defendants' Violations of Section 14(e)*

The district court held that the various communications to shareholders by members of the Piper family and the May 8 press release by Piper and BPC did not violate §14(e), but that the BPC registration statement and prospectus were materially misleading. 337 F.Supp. at 1134-38, 1138-40. CCI challenges the court's holdings with respect to the Piper communications to shareholders and the May 8 press release. Defendants contend that the BPC registration statement and prospectus did not violate §14(e). We hold that each of the defendants violated §14(e).

(a) Controlling Principles In Determining Section 14(e) Violations

Before turning to defendants' alleged violations of Section 14(e), a statement of what we believe to be the controlling principles in determining such liability may aid in understanding our rulings which follow.

Section 14(e) is relatively new. It has not been the subject of extensive judicial construction, and never in the context of the factual situation here presented. And yet the underlying proscription of §14(e) is virtually identical

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12 The fraudulent acts alleged to have been committed by Piper and its allies, BPC and First Boston, in effect were in the nature of countersolicitations to CCI's tender offers. CCI's right of action against each therefore is the same: to recover damages or to obtain other relief based on defendants' illegal conduct under §14(e) to achieve an objective injurious to CCI.

to that of Rule 10b-5; the critical difference is that the latter is applicable only "in connection with the purchase or sale of any security", while the former is applicable "in connection with any tender offer . . . or any solicitation of security holders in opposition to . . . any such offer . . . ." In determining whether §14(e) violations were committed in the instant case, we shall follow the principles developed under Rule 10b-5 regarding the elements of such violations. In short, we hold that a violation of §14(e) is shown when there has been a material misstatement or omission concerned with a tender offer and when such misstatement or omission was sufficiently culpable to justify granting relief to the injured party. The key concepts in this formulation are *materiality* and *culpability.*[13]

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13 It is well to bear in mind Judge Friendly's observations regarding §14(e) in *Electronic Specialty Co.* v. *International Controls Corp., supra,* 409 F.2d at 948:

> "The likeness of tender offers to proxy contests is not limited to the issue of standing. They are alike in the fundamental feature that they generally are contests. This means that the participants on both sides act, not 'in the peace of a quiet chamber,' Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp., 277 F.2d 9, 13 (4 Cir.), cert. denied, 364 U.S. 879, 81 S.Ct. 168, 5 L.Ed 2d 102 (1960), but under the stresses of the market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders. These considerations bear on the kind of judgment to be applied in testing conduct—of both sides—and also on the issue of materiality. As to this we reaffirm the test announced in *Symington Wayne, supra,* 383 F.2d at 843, whether 'any of the stockholders who tendered their shares would probably not have tendered their shares' if the alleged violations had not occurred. See also General Time Corp. v. Talley Industries, Inc., supra, 403 F.2d at 161-162."



The concept of materiality focuses on the weightiness of the misstated or omitted fact in a reasonable investor's decision to buy or sell. We articulated the materiality standard in *List* v. *Fashion Park, Inc.,* 340 F.2d 457, 462 (2 Cir.), *cert. denied,* 382 U.S. 811 (1965), to be "whether 'a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question.'"[14] The materiality test is concerned only with whether a prototype reasonable investor would have relied. See *Heit* v. *Weitzen,* 402 F.2d 909, 912-14 (2 Cir. 1968), *cert. denied,* 395 U.S. 903 (1969). Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor would weigh it in his decision whether or not to invest. See *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2 Cir. 1968) (*en banc*), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969).

As for the concept of culpability, intent to defraud is not an indispensable element in a private action under Rule 10b-5; knowledge of falsity or reckless disregard for the truth may be sufficient. See *Shemtob* v. *Shearson, Hammill & Co.,* 448 F.2d 442, 445 (2 Cir. 1971); *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290-91 (2 Cir. 1969), *cert. denied,* 397 U.S. 913 (1970); *Heit* v. *Weitzen, supra,* 402 F.2d at 913-14; *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 854-55. We have indicated, however, that mere negligent conduct is not sufficient "to permit plaintiffs to recover damages in a private action under §17(a) or §10(b)." *SEC* v. *Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1096 n. 15 (2 Cir. 1972).

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14 And in *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 849: "[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts . . . which may affect the desire of investors to buy, sell, or hold the company's securities."

The function of what has been called the "scienter" requirement is to confine the imposition of liability to those whose conduct has been sufficiently culpable to justify the penalty sought to be exacted. The initial inquiry in each case is what duty of disclosure the law should impose upon the person being sued. See *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210, 212 (9 Cir. 1962); *Ellis* v. *Carter*, 291 F.2d 270, 274 (9 Cir. 1961). In making this determination we should bear in mind that a major congressional policy behind the securities laws in general, and the antifraud provisions in particular, is the protection of investors who rely on the completeness and accuracy of information made available to them. See 1 Bromberg, Securities Law: Rule 10b-5, §7.1, at 14 (1971). Those with greater access to information, or having a special relationship to investors making use of the information, often may have an affirmative duty of disclosure. When making a representation, they are required to ascertain what is material as of the time of the transaction and to disclose fully "those material facts about which the [investor] is presumably uninformed and which would, in reasonable anticipation, affect his judgment". *Kohler* v. *Kohler Co.*, 319 F.2d 634, 642 (7 Cir. 1963). A failure to perform these duties with "due diligence" in issuing registration materials provides a basis for suit under §11 of the 1933 Act, 15 U.S.C. §77k (1970). A knowing or reckless failure to discharge these obligations constitutes sufficiently culpable conduct to justify a judgment under Rule 10b-5 or §14(e) for damages or other appropriate relief against the wrongdoer. *SEC* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 854-55.

In sum, and put as simply as possible, the standard for determining liability under §14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such such an offer, is whether



plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort.

Our disagreement with the district court on whether defendants have violated §14(e) does not go to its findings of fact, as to which the "unless clearly erroneous" test applies, but to its application of the legal standards just discussed. See *Mamiye Bros.* v. *Barber S.S. Lines, Inc.*, 360 F.2d 774, 776-78 (2 Cir.), *cert. denied*, 385 U.S. 835 (1966).

We turn now to a consideration of the §14(e) violations charged against each of the defendants.

(b) Piper Family

CCI's charges against the Piper family stem from a series of communications to Piper shareholders in the form of shareholder letters and a press release.

The shareholder letters dated Januury 27 and 28, sent while the CCI tender offer was pending, stated that the Piper Board of Directors had "carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders". It further stated that, if CCI were suddenly willing to offer shareholders $65, it must believe that Piper stock is worth more than it is offering.[15] CCI contends that a reasonable shareholder

15 The letter also stated that Piper was talking to major industrial corporations about combination and that if one could be put through, "[A] higher value could be realized for all shareholders." This was not misleading because Piper officials were trying to find an alternative, such as a merger, that would be better for themselves and Piper shareholders. The letter also urged shareholders to consider "important points" such as the facts that "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher." CCI maintains that they should also have disclosed that sales and earnings for the first quarter of the next

would have assumed that "inadequate" referred to price. At that time Piper stock was selling on the market for considerably less than $65 per share. First Boston in fact had given Piper its opinion that the price offered was "fair and equitable". The Piper corporation itself, acting through the Piper family, at that time was contemplating a large sale of Piper stock to Grumman at the same price.

The district court concluded that "inadequate" referred to factors other than price, such as the quality of Chris-Craft management. We disagree. A reasonable shareholder reading the letter most likely would assume that the reference was to price. Since price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific. The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. See *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7 Cir. 1969). By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading.

fiscal year were down considerably compared to the first quarter of the previous year. We cannot say that, once Piper mentioned sales and earnings figures, it was required to reveal all relevant figures. Nor can we say that the decline was so severe that it made the previous year sales and earnings figures deceptive.



CCI also attacks the press release of January 29 by Piper officials that Grumman had "agreed to purchase" 300,000 shares of Piper at $65 per share. CCI argues that the tentative nature of the January 25 agreement was not adequately disclosed in the release. The agreement permitted Grumman to return the entire 300,000 shares for a refund of its purchase price plus interest within six months. This "put" provision was not disclosed in the press release, although it was described in Piper's application for listing with the NYSE. The release did reveal that the agreement was subject to the approval of the Piper and Grumman boards as well as other conditions. The published list of conditions gave the appearance of being exclusive, thus solidifying the impression that the sale was all but formally completed.

We find no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt. See Schmultz & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 Bus. Law 115, 132-34 (1967). We also agree with the district court's conclusions that the agreement was not a "sham" and that the "put" was a rational and logical part of the agreement. But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e). By failing to disclose this provision, the release portrayed the Grumman agreement as a completed, favorable deal between Piper and Grumman which also was likely to provide a basis for further and more profitable relations between the two companies.[16] The "agreement" actually was

16 This depiction of the agreement was further suggested by a statement in the release that the "purchase provides an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies."

a preliminary and conditional overture directed toward a possible merger. The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer.

CCI also challenges the shareholder letters with respect to the BPC and CCI exchange offers on the ground that they failed to disclose the Piper family's financial interest in the success of the BPC general exchange offer. Letters dated June 4 and July 25 urged Piper shareholders to accept the BPC exchange offer. A June 20 letter disparaged the CCI exchange offer. All the letters were sent over the signature of W. T. Piper, Jr. None of the letters explained that, under the terms of the May 8 agreement between BPC and the Piper family, the Piper family might profit handsomely from BPC's acquiring a controlling interest in Piper.[17] The agreement provided, as stated above, that, if the value of the securities package traded to the Piper family for their Piper holdings was below $80 per Piper share on the effective date of the general exchange offer, BPC would make up the difference, *if* BPC were successful in obtaining over 50% of the outstanding Piper shares. The Piper family therefore potentially had an interest in the success of the BPC exchange offer. By July 25, they must have realized that this interest amounted to a considerable sum of money.[18] If the letters merely had supplemented the prospectus in providing publicity for the terms of the offer, there might be less basis for concern that the Piper family's self-interest was not disclosed. But the letters are replete with the personal opinions and recommendations of W. T. Piper, Jr. on the quality of the BPC securities and the management of BPC. The July 25 letter, sent after the Piper family must have known what they stood to gain in the event of a successful BPC takeover, stated that "we strongly recommend" the offer and "we have been impressed with the management and operations of Bangor Punta". Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963).

We hold that the communications to Piper shareholders in the form of shareholder letters and a press release constituted violations of §14(e) by the Piper family defendants.

(c) BPC And Its Officers

CCI's claims that BPC violated §14(e) arise from public communications and filed materials regarding the BPC general exchange offer. On May 8, Piper and BPC published a press release which stated that BPC had agreed

> "to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share."

CCI contends that this statement was materially misleading because a reasonable investor would have interpreted the

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17 The preliminary and final prospectus for the BPC general exchange offer disclosed that there had been an exchange offer made to the Piper family and related that under the May 8 agreement the family might gain from the success of the general exchange offer. We do not believe under the circumstances that disclosure in a detailed and extremely complex prospectus, which did not accompany the letters, fulfilled the Piper family's duty to reveal this material fact. Cf. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429, 433 (7 Cir. 1968), *vacated and remanded*, 396 U.S. 375 (1970).

18 One estimate placed the amount at a total of $13 million.

$80 value figure to be a guarantee of market value when the actual market value proved to be considerably less than $80. As stated above, we held in our earlier en banc decision that this statement of value violated §5(c) of the 1933 Act but we made no determination whether the statement also was misleading. 426 F.2d at 573-76. We did observe that a prospectus "would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended". *Id.* at 575.

The district court concluded that "the language of the May 8 release could not be confused by reasonable men . . . with offers intending or implying guarantees of market value." 337 F.Supp. at 1137 n. 9.[19] We agree. If the release were to be construed as a promise of future value, it would not be as a promise of market value. A reasonably knowledgeable investor is aware that the "value" of a security can refer either to the market or sales price of the security or to its worth as measured by the assets and earnings of the issuing company. The absence of the term "market value" in the release, as well as the fact that the valuation was to be "in the judgment of the First Boston Corporation", would suggest to a prudent investor that "value" here was to be based on an appraisal of assets and earnings.

The statement of value was not a fraud violation for another reason. It was not a material representation. A rational investor considering whether to take advantage of the BPC exchange offer after it became effective would not have been influenced by the earlier promise of value when the actual package had been disclosed to him for scrutiny and value determination. We therefore agree

19 The district court also held that even if a prudent investor might have interpreted "value" to mean market or resale value, the BPC package turned out to be worth $73 to $79, the difference between the promise and performance being "de minimis".



with the district court that the May 8 release has not been shown to have been damaging to CCI.

BPC contends that the district court erred in holding that the BPC registration statement was misleading. The district court, in *SEC* v. *Bangor Punta Corporation,* 331 F.Supp. at 1160-61, held that BPC's failure to disclose the circumstances which made the carrying figure for the Bangor and Aroostook Railroad (BAR) obsolete caused the registration statement to be misleading. BPC carried on its books its holdings in the BAR (98.7%) at $18.4 million. Although this amount was established through questionable accounting techniques, such techniques are not specifically attacked here.[19a] CCI does charge that BPC failed to disclose that it had negotiated for a sale of the BAR at a price substantially below $18.4 million. Some additional facts are necessary to an understanding of this claim.[20]

At the April 1, 1969 BPC board meeting, BPC had considered disposing of the BAR and had appointed a committee headed by Curtis Hutchins to study various methods of disposition. On May 12 and 15, Hutchins met with Frederic Dumaine, Chairman of the Board of Amoskeag, Inc., to discuss the possible sale of the BAR to Amoskeag. On May 12, Dumaine offered $5 million for the BAR. He indicated no preference for buying assets or stock. On May 15, Hutchins provided Dumaine with information on the BAR, such as the railroad's cash flow figures and balance sheet. Dumaine decided that he wanted to buy the stock. Hutchins met with his committee the same day. They agreed that a sale to Dumaine at $5 million would be

19a Among other things, the increase in book value resulting from a revaluation of the BAR was credited directly to earned surplus, thus by-passing the income accounts. This is dubious accounting procedure.

20 A full discussion of the BAR incident is set forth by the district court in *SEC* v. *Bangor Punta Corporation*, 331 F.Supp. at 1156-60.

BPC's best course of action. At a BPC board meeting on May 21, Hutchins reported Dumaine's offer and his committee's recommendation.[21] He did not ask for approval of the sale but only for authority to continue negotiations. Nicolas M. Salgo, BPC's Chairman, suggested selling 51% of the BAR then and 49% later for a total consideration of $7 million. This proposal was rejected by Dumaine when it was later submitted to him. The BPC board resolved to study further the tax and accounting ramifications of the sale. On May 27, Hutchins and Dumaine formulated a letter of understanding concerning the sale. This was not signed by Hutchins. It stated that "you [Dumaine] and I have agreed . . . on the sale" at $5 million, but qualified this by noting that any understanding was subject to BPC board approval. Hutchins repeatedly explained to Dumaine that his authority was limited to exploring possibilities of divestiture and that he did not have the power to make a decision alone. On June 3, Hutchins met with the BPC management. They decided to table the matter while their tax and accounting departments studied the effect of selling assets rather than stock. On June 16, Hutchins informed Dumaine that the board refused to approve the letter of understanding. He further explained that the BPC management considered it essential that the legal and accounting effects of the transaction be studied, and that these investigations probably could not be completed for another two months because other matters (the exchange offer) had priority. Hutchins expressed to Dumaine his personal opinion that a deal would be made. On September 9, the board authorized Hutchins to make the sale to Amoskeag of BAR assets rather than stock, if possible, but basically with freedom to enter into the deal on whatever terms he decided were best. The agreement was entered

21 Hutchins presented three options to the board: sale, merger, or status quo. He and the board rejected the last two options.



into on October 2, 1969. This resulted in BPC sustaining a $13.8 million book loss, thus contributing to an $8,566,964 loss of net income for 1969 and to a reduction in retained earnings from $37.9 million at the end of fiscal 1968 to $20.5 million at the end of 1969.

The district court found that "the Bangor Punta directors could not [at the time of the exchange offer] have believed that the $18.4 million figure . . . any longer represented a responsible appraisal of market value of the BAR holding". 331 F.Supp. at 1161. It concluded that "[c]onsistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier". *Id.*

We hold, under the principles enunciated above for determining §14(e) liability, that BPC was required to disclose to Piper shareholders the circumstances surrounding the negotiations for a sale of the BAR, to apprise them with a reasonable degree of accuracy of the seriousness of such negotiations, and to inform them of the basic effect this might have on the operations of BPC. In *SEC* v. *Texas Gulf Sulphur Co., supra*, 401 F.2d at 849, we stated the standard of materiality to be applied where an event has not yet occurred but certain facts are known in advance:

> "[W]hether facts are material . . . when the facts relate to a particular event . . . will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

Hutchins and the other special committee members—Robertson, Stone, Siel—were highly knowledgeable about the BAR's affairs. Several had been past presidents of

the BAR and all had managed it in some capacity. These men had decided in May 1969 that a sale to Amoskeag was the only viable alternative. Certainly the BPC board was likely to be strongly influenced by their decision. The board in fact had taken a position favorable to the sale from the beginning and was primarily concerned with getting as much out of the sale as possible. The board knew that a merger of the BAR with another New England railroad was improbable. If they kept it, there would have to be substantial capital outlays of $5 million over the next five years to break even. Under these circumstances, by July the board must have realized that a sale of the BAR at a price substantially below its carrying value would be effected in the near future. A possible loss of $13 million, moreover, would have a sufficiently drastic impact on the financial position of BPC to justify disclosure even if the probability of a sale were less. The district court found that a sale of the BAR at $5 million would eliminate 36% of BPC's retained earnings and 12% of the shareholders' book equity.

In addition to the sales negotiations, there were other circumstances indicating that the book value of the BAR was obsolete and unrealistic. Since 1967, the management of BPC had been trying to dispose of the BAR, originally through a merger with another railroad. They apparently realized that the BAR did not have a promising future. The $5 million offer from Amoskeag was the only realistic offer that BPC had received. This alone demonstrated that the BAR was not worth anything close to $18.4 million. BPC's auditors reported on May 20 that a sale to Amoskeag at that price would be reported as an extraordinary loss of $13.5 million.

On the basis of these facts, the district court concluded that the registration statement was "unintentionally in error" and that the omissions were "mere negligence". It



further concluded that the requisite scienter for a private damage action had not been shown. We disagree.

The district court's findings of fact, supported by substantial evidence, do not warrant the conclusions that BPC's officers had decided to sell the BAR before the exchange offer became effective and had postponed consummation in order to avoid disclosure. Nor does the evidence show that BPC failed to disclose the sales negotiations in bad faith. As we have indicated above, however, intent to defraud is not an indispensable element in a private action for damages under the antifraud provisions of the federal securities laws. *Heit* v. *Weitzen, supra,* 402 F.2d at 913-14. The securities laws impose upon an offeror of an exchange offer a duty to act reasonably in discovering facts material to the offer as of the time of the transaction and in disclosing fully those material facts of which the offeree is presumably unaware and which ostensibly would influence his judgment. *Cf. Kohler* v. *Kohler Co., supra,* 319 F.2d at 642. Corporate officers have a reasonable area of discretion in determining how far to explore the facts and in deciding what facts need to be disclosed. So long as they operate within this area, the securities laws do not impose liability. In order to encourage candor in the securities market, and well informed decisions by investors, this discretion must be exercised with caution.[22]

We believe that the officers of BPC greatly transgressed their allowable area of discretion in not disclosing the BAR negotiations and other circumstances reflecting the value of the BAR. The officials in charge of the exchange offer

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22 We do not hold that a corporation prima facie has acted unreasonably if the omission or misstatement is material. Corporate officials must be allowed considerable room for discretion; otherwise their normal functions as corporate officials will be inhibited. The totality of the facts and circumstances must be examined to determine whether the officials were reckless or grossly negligent.

were well aware of the discussions with Amoskeag and the activities of the special BAR committee. They also were aware of all the other circumstances that indicated that the book value of the BAR was deceptive and unrealistic. Their judgment not to reveal basic information about the then current status of the BAR holdings clearly was unreasonable. They showed reckless disregard for the import of their activities concerning the BAR. They knew that the book value of the BAR set forth in the registration statement was no longer realistic. Considering the totality of the facts and circumstances, they failed to discharge their clear duty of proper disclosure.

We hold that such conduct on the part of BPC and its officers violated §14(e).

(d) First Boston And Its Officers

CCI's claim that First Boston violated §14(e) is based on its conduct in connection with the BPC exchange offer. First Boston was the underwriter and dealer-manager for the exchange offer. As such, it had ready access to the books and records of BPC. It availed itself of this privilege sufficiently to examine the minutes of the BPC board meetings, including those of April 1 and May 21. Representatives of First Boston did not see the letter of understanding between Hutchins and Dumaine. They did question BPC's management regarding the BAR and were informed that there were no plans at the time to dispose of the railroad. That appears to have been the full extent of First Boston's investigation.

The federal securities laws impose upon private parties the primary responsibility for verifying the accuracy and completeness of information provided to potential investors. See H.R. Rep. No. 85, 73rd Cong., 1st Sess. 2-3 (1933). For this reason, Section 11 of the Securities Act



of 1933, 15 U.S.C. §77k (1970), authorizes the purchaser of a security to sue the underwriter and others involved in the issuance of securities, if the registration statement contains a misstatement or misleading omission of material fact. A "due diligence" defense to such a suit is available to all but the issuer. Section 11(b), 15 U.S.C. 77k(b) (1970), provides that a defendant can escape liability if he can prove that:

> "he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

Section 11 of course provides a cause of action only for a purchaser of securities issued pursuant to a registration statement. We believe that §14(e) imposes liability upon an underwriter in favor of a competing offeror, specifically where the misrepresentation occurs in the context of a contest for control. An underwriter is liable under §14(e) as an aider and abettor of the issuer if he was aware of a material falsity in the registration statement or was reckless in determining whether material falsity existed. See *SEC* v. *North American Research & Development Corp.*, 424 F.2d 63, 81 (2 Cir. 1970); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, Contribution*, 120 U. of Pa. L. Rev. 597, 620-46 (1972).

Section 14(e) provides that "[i]t shall be unlawful for any person to *make* any untrue statement of a material fact" or to mislead by omitting "to state any material fact". (Emphasis added). An underwriter or dealer-man-

ager for a securities issue does not actually prepare the registration materials. Thus, in a literal sense, it does not "make" statements to potential investors. But we do not read §14(e) so narrowly. An underwriter by participating in an offering constructively represents that statements made in the registration materials are complete and accurate. The investing public properly relies upon the underwriter to check the accuracy of the statements and the soundness of the offer; when the underwriter does not speak out, the investor reasonably assumes that there are no undisclosed material deficiencies. The representations in the registration statement are those of the underwriter as much as they are those of the issuer.

Self-regulation is the mainspring of the federal securities laws. No greater reliance in our self-regulatory system is placed on any single participant in the issuance of securities than upon the underwriter. He is most heavily relied upon to verify published materials because of his expertise in appraising the securities issue and the issuer, and because of his incentive to do so. He is familiar with the process of investigating the business condition of a company and possesses extensive resources for doing so. Since he often has a financial stake in the issue, he has a special motive thoroughly to investigate the issuer's strengths and weaknesses. Prospective investors look to the underwriter—a fact well known to all concerned and especially to the underwriter—to pass on the soundness of the security and the correctness of the registration statement and prospectus. See generally Note, *Escott* v. *Barchris: "Reasonable Investigation" and Prospectus Liability Under Section 11 of the Securities Act of 1933*, 82 Harv. L. Rev. 908 (1969). The Senate Report that accompanied proposed §14(e) indicates that this degree of involvement by the underwriter in the making or opposing of



a tender offer may subject him to liability if the registration materials are misleading:

> "This provision would affirm the fact that persons *engaged* in making or opposing tender offers or *otherwise seeking to influence* the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal". (Emphasis added). S. Rep. No. 510, 90th Cong., 2d Sess. (1968), quoted in U.S. Code Cong. & Admin. News 2811, 2821 (1968).

We turn now to a determination of whether First Boston violated §14(e). Since we already have concluded that the BPC registration statement and prospectus were materially deficient, the remaining issue to be determined is First Boston's culpability. First Boston is a skilled, experienced and well respected dealer-manager and underwriter. It had an obligation with respect to the BPC exchange offer to reach a careful, independent judgment based on facts known to it as to the accuracy of the registration statement. Moreover, if it was aware of facts that strongly suggested, even though they did not conclusively show, that the registration materials were deceptive, it was duty-bound to make a reasonable further investigation.

We hold that First Boston did not adequately perform its duty in these respects. The minutes of the April 1 and May 21 board meetings,[23] which were examined by the

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23 In view of the critical bearing these minutes have upon the issue of First Boston's liability, we set forth the relevant portions.
The minutes of the BPC board meeting of April 1, 1969 included the following reference to the BAR (Appendix 763):

> "ORGANIZATION AND LONG RANGE PLANNING.
>
> Mr. Salgo* stated that he wished to discuss with the Board the general philosophy of the types of business in which Bangor

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* Chairman of the Board.

underwriting department of First Boston, disclosed the early discussions and negotiations concerning the disposition of the BAR. At the April 1 meeting, the board considered disposing of the BAR and appointed a committee to study the alternatives. At the May 21 meeting, a pos-

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Punta should be involved, and also share with the Board some of the thoughts of management in this connection. He stated that there had been under consideration for some time the question of whether minority interests in some of the more attractive operations, such as the Leisure Time and Public Security Groups, should be spun off, but that he, Mr. Robertson and Mr. Wallace are in unanimous agreement that this should not be done. Instead, there have been discussions about the possibility of spinning off, either in whole or in part, those companies where growth is not developing as rapidly as it is throughout the remainder of the Corporation. In particular, he stated that such discussions had centered upon the Process Engineering Group, the Railroad and the Textile Group. In this connection, he pointed out that the Textile Group is a substantial contributor of cash even though it is not in a growth area. Mr. Salgo stated that the earnings of the Process Engineering Group are small and we need to seriously consider whether this group could be sold to another company. With respect to the Railroad, he stated that there is a question as to whether it should eventually go into a larger railroad system.

Mr. Salgo further stated that it would be very helpful if a committee from the Board of Directors could study the possible divestiture of the Bangor and Aroostook Railroad resulting in public ownership of it, either in whole or in part. He asked Mr. Curtis M. Hutchins to serve as Chairman and Messrs. George H. Seal and Robert G. Stone to serve as members of this Committee, with Mr. W. Jerome Strout as an ex-officio member and advisor to the Committee."

The minutes of the BPC board meeting of May 21, 1969 referred to the BAR as follows (Appendix 775-76):

"BANGOR AND AROOSTOOK RAILROAD.

Mr. Curtis M. Hutchins, as Chairman of a special committee appointed by Mr. Salgo at the Board of Directors meeting held April 1, 1969 (Reference: BPC-4-1-69-28), reported that he and Messrs. Robert G. Stone and George H. Seal (members of the special committee) have just completed a study of the situation with respect to the Bangor and Aroostook Railroad and wish to submit to the Board their unanimous report through Mr. Hutchins.

Mr. Hutchins stated that there appears to be three possibilities



sible sale to Amoskeag was discussed extensively. The board showed considerable interest in the sale at the time and gave the impression of strongly favoring it. These minutes, if not sufficient in themselves to lead a reasonable person to believe that the registration statement was misleading, certainly would have impelled a reasonable person

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which could be adopted with respect to the future of the Railroad. Bangor Punta might keep the Railroad as is, merge the Railroad with another railroad if that were possible, or sell the Railroad at the best possible price.

Mr. Hutchins stated that keeping the Railroad is not very appealing. He pointed out that because of the increased use of trucks and the restricted nature of the territory involved, it is doubtful that the traffic on the Railroad will increase. It appears that if the Railroad is to break even over the next five years, it will be necessary to spend substantial amounts of money for new freight cars and other equipment. He also stated that in discussing the situation with Mr. W. Jerome Strout, President of the Railroad, it appears that the amount of money to be expended might be as much as $5,000,000. Under these circumstances, Mr. Hutchins pointed out that it becomes more and more difficult to justify retention of the Railroad.

Mr. Hutchins next discussed the second possibility, that is, consolidating with another railroad. In this connection, he felt that a combination with the Boston & Maine Railroad, if otherwise possible, might result in Bangor Punta's receiving a third to a 40% interest in a new company. The consideration, however, would be in the form of securities rather than cash. Mr. Hutchins did not feel that this would be a palatable solution.

Mr. Hutchins next considered the question of selling the Railroad and to whom it might be sold. He pointed out that neither the Penn Central nor the Norfolk and Western Railroads have any known interest in the Bangor and Aroostook Railroad and a merger with either of these railroads is very unlikely. He stated that the only person whom he knew who might be interested in the Railroad is Mr. F. C. Dumaine, Jr., Chairman of Amoskeag Company. Mr. Hutchins stated that he has had preliminary discussions with Mr. Dumaine who had indicated that he might be willing to pay $5,000,000. in cash, a combination of cash and Bangor Punta securities, or Bangor Punta securities for the stock of the Bangor and Aroostook Railroad owned by the Corporation. At this point, Mr. Salgo asked whether it might be wise to offer to Mr. Dumaine 51% of the stock of the Bangor and Aroostook Railroad at book value, with an option to purchase the remaining 49% at a higher

to explore further. The only additional investigation by First Boston was to question company officials about the possible sale of the BAR. First Boston did not seek verification of the officials' answer that a sale was not anticipated at that time. Cf. *Escott* v. *Barchris*, 283 F.Supp. 643, 697 (S.D.N.Y. 1968, McLean, D.J.).[24] It did not make a more careful search of BPC's records, nor did it talk to officials

price, with a total consideration, therefore, of approximately $7,000,000.

(At this point, Mr. Flick was called away from the meeting and Mr. Wallace acted as Secretary for the remainder of the meeting.)

Mr. Hutchins stated that, in his opinion, Mr. Dumaine would not agree to a price of $7,000,000., but that he probably would be able to obtain the approval of the Board of Directors of Amoskeag Company at a price of $5,000,000.

Mr. Hutchins stated that he is not asking for an approval by the Corporation's Board of Directors at this time, but only the authority to continue discussions with Mr. Dumaine. He stated that he wishes to first ascertain whether Amoskeag Company is willing to submit a definitive proposal.

Mr. Salgo next suggested that he would like to have Mr. Dumaine transfer to the Corporation 22,500 shares of Bangor Punta $1.25 Convertible Preference Stock as consideration for an option on 51% of the Railroad, the option to be for sixty days with the provision that the stock would be forfeited if the option is not exercised. In discussing Mr. Salgo's proposal, Mr. Strout pointed out that Mr. Dumaine also wishes to enter into an arrangement with the Maine Central Railroad; he does not believe the Maine Central Railroad will agree if such an agreement existed between Amoskeag Company and Bangor Punta Corporation.

After considerable discussion, it was the consensus of the Board that Mr. Hutchins should attempt to negotiate on the 49/51% basis suggested by Mr. Salgo, but that he has the authority to negotiate on the basis of a sale of 100% of the Bangor and Aroostook Railroad subject to further investigation of accounting and tax ramifications of such a transaction and approval by the Board of Directors or the Executive Committee of the Board of Directors."

24 The standard of reasonableness under §11 of the 1933 Act is that of "a prudent man in the management of his own property". 15 U.S.C. §77k(c)(1970). It is unnecessary for us to decide whether a reasonableness standard should be imposed under §14(e) since First Boston's conduct, in our view, went far beyond mere negligence.



at Amoskeag after it discovered from the minutes that Amoskeag was the likely buyer. Under these circumstances, First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate.

We hold that the conduct on the part of First Boston and its officers violated §14(e).[25]

(3) *Causation*

One of the fundamental issues upon which we disagree with the district court is that of causation.

The district court correctly pointed out that CCI neither bought nor sold Piper stock on the basis of the communications from the Piper management, the May 8 press release or the BPC registration statement. The court concluded that CCI was seeking damages as a "defeated contender for control" without showing that "a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta". 337 F.Supp. at 1139. (emphasis that of district court). We hold that the district court applied inappropriate causation principles and erred in assessing the nature of CCI's complaint.

25 We agree with the district court that there is no merit to CCI's other claims against First Boston, essentially that it was the chief strategist for Piper and BPC in the control battle. The district court found, based on substantial evidence, that in its capacity as investment banker First Boston merely provided professional services to these companies. The business decisions that led to violations of the securities laws were initiated by these companies, not by First Boston in its role as investment banker. We are aware of no authority for holding First Boston liable in that capacity.

We agree with the district court's findings that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston. On the other hand, it is equally clear that BPC itself obtained control through its violations of the securities laws.

Since failure to disclose the BAR negotiations was a material omission, the next question is whether such omission was relied upon. It is important to note that, since the harmful effect of the negligence in this case did not depend upon the exercise of volition by CCI, but instead upon the exercise of volition by other persons, CCI need not show that it relied upon the deception. CCI must show that there was a misrepresentation upon which the target corporation stockholders relied and that this was in fact the cause of CCI's injury. See *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2 Cir.), *cert. denied*, 389 U.S. 970 (1967).

We have held that reliance is established in a Rule 10b-5 action if the " 'misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss' ". *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 (2 Cir.), *cert. denied*, 382 U.S. 811 (1965). In many instances, courts have applied a subjective test to the reliance requirements, considering such factors as the plaintiff's general business expertise, *Clement A. Evans & Co.* v. *McAlpine*, 434 F.2d 100, 104 (5 Cir. 1970), his familiarity with the affairs of the corporation, *Kohler* v. *Kohler Co.*, 319 F.2d 634, 641-42 (7 Cir. 1963), and his access to the information misrepresented, *Hafner* v. *Forest Laboratories, Inc.*, 345 F.2d 167, 168 (2 Cir. 1965). See generally Note, *Reliance Under Rule 10b-5: Is the "Reasonable Investor" Reasonable?*, 72 Colum. L. Rev. 562 (1972).



Where the transaction is accomplished through impersonal dealings, such as on a stock exchange, or for some other reason the factors that influenced the parties are not readily apparent, the decisions have discussed liability in terms of the "materiality" of the misrepresentation. See *Heit* v. *Weitzen*, 402 F.2d 909, 913 (2 Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); *List* v. *Fashion Park, Inc.*, *supra*, 340 F.2d at 462-64; *Kahan* v. *Rosenstiel*, 424 F.2d 161, 173-74 (3 Cir. 1970). This constructive reliance principle is particularly appropriate in class actions where proof of actual reliance by numerous class members would be impracticable. *Kahan* v. *Rosenstiel*, *supra*.

The Supreme Court adopted this principle in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Mills* was a class action brought by shareholders under §14(a) of the 1934 Act, 15 U.S.C. §78n(a) (1970), complaining that proxy solicitation material recommending a merger failed to disclose a conflict of interest. The proxy contest was won by the alleged wrongdoers and they needed the votes of minority shareholders to achieve the victory. The Court, in an opinion by Mr. Justice Harlan, stated the causation principle to be applied:

> "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 396 U.S. at 385.

The Court established a presumption of reasonable reliance in order to avoid an overly difficult burden of proof. This was to encourage the vigorous enforcement of the securities laws through shareholder suits, and to effectuate the con-

gressional purpose of enabling shareholders to make informed decisions "by resolving doubts in favor of those the statute is designed to protect". *Id.*

The Supreme Court recently held that the *Mills* principle is applicable to a Rule 10b-5 damage action. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). In *Ute*, members of a large class of security holders had been influenced to sell because of a failure to disclose. The Court held:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision . . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." 406 U.S. at 153-54.

Accord, *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 288-91 (3 Cir. 1972).

The district court below acknowledged that in "a proper case" the *Mills* test is sound, but concluded that this was not an appropriate case. It also held that §14(e) does not in any way alter the result. 337 F.Supp. 1139-40. We disagree.

The *Mills-Ute* test may be appropriately invoked, as here, in the context of a suit under §14(e) by an offeror against the target corporation and its allies. In such an action, the claim, as here, usually will be that the offeror's opponents have defeated him or impaired his efforts by misleading the target shareholders. *H.K. Porter Co.* v. *Nicholson File Co., supra,* 4 CCH Fed.Sec.L.Rep. at 93,080-81. Concentration upon such shareholders often is the primary means of defeating the tender offer. Since the



offeror usually is a sophisticated businessman, his opponents rarely will be able to deceive him directly. As we said in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 796 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When [the offeror] entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions." [26]

In the instant case, the offeror was not directly deceived but it was directly injured by defendants' deception of the Piper shareholders.

The fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so. These impracticalities are avoided by establishing a presumption of reliance where it is logical to presume that reliance in fact existed. *Kohn* v. *American Metal Climax, Inc., supra,* 458 F.2d at 288-91. As we have stated above, §14(e) was designed to protect offerors from

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26 In *Crane*, the offeror, Crane, made a tender offer for stock in Air Brake, but was thwarted when an ally of Air Brake, Standard, made heavy market purchases in Air Brake so as to manipulate its price. We held that Crane was entitled to specified relief under Rule 10b-5 even though it had not established that its tender offer would have been more generally accepted if these violations had not been committed. The district court in the instant case distinguished Crane as a decision where the "character of the violation and the clear causal nexus were crucial to the . . . result". 337 F.Supp. at 1140. We do not read *Crane* in such a restricted fashion.

unfair and unlawful opposition. By "resolving doubts in favor of those the statute is designed to protect", *Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 385, we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly.

In applying the *Mills-Ute* test to the instant action, we presume that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations to which we have referred above. Even if we assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss, we still must conclude that BPC's success was unlawfully attained. Piper shareholders had a third option, i.e. to hold their shares, which presumably they would have chosen if all the material facts had been disclosed. Under the *Mills-Ute* test, we must presume that BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. See *Vine* v. *Beneficial Finance Co., supra,* 374 F.2d at 635. Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown.

What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. CCI spent large sums of money in actively seeking control. Its purchases were made in the reasonable belief that its opponents would battle hard but within the law. CCI is entitled to compensatory damages for the decline in the value of the minority shareholder's interest with which it became encumbered as a result of competing against those who violated the securities laws.



Even if CCI had discovered, prior to purchasing some of the shares that it now holds, that BPC was competing unfairly, it was not required to mitigate damages by dropping out of the contest. A victim of a securities fraud does not have to elect between pursuing his goal in spite of the unlawful tactics of his opponents and recovery of damages for injuries sustained. Indeed, if CCI's persistence in the fight despite the violations had brought it victory, it would not have sustained damages from being put in a minority shareholder's position.

The Piper family's violations also caused injury to CCI. Piper contends that since CCI was not able and willing to accept any more shares than it did accept as a result of the cash tender offer, the January letters to shareholders and the Grumman press release were harmless. The evidence does not support this contention.

Since CCI had decided by the time of the cash tender offer that its objective was to win control of Piper, it clearly was willing to accept as many shares as it could obtain. While it was ready to commit itself to purchase only 300,000 shares, that limitation does not indicate that it would not accept a substantial number of additional shares if tendered.[27] Indeed, it expressly reserved the right to purchase more than the 300,000 shares.[27a] And although Piper offered some evidence indicating that CCI might have trouble

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27 Mr. Gordon testified, when asked why CCI had committed itself to purchase no more than 300,000 shares, that one reason was that "[w]e did not want . . . Piper to emphasize the fact that the financing for the shares beyond 300,000 had not yet been arranged—to emphasize that successfully, because we knew we could arrange it, but we didn't have it at that time."

27a Officers of CCI announced to the press that the tender offer was successful. The Piper family would have us construe this announcement as a concession that CCI did not expect or desire more from its cash tender offer. As is well known, such statements in this context often are made for the sake of appearance. We decline to ascribe to them the interpretation suggested by the Piper family.

financing additional purchases, it appears that such financing was available. Mr. Gordon testified that, before the cash tender offer had expired, he had arranged with Burnham & Co. to borrow up to $22,000,000 if needed to purchase shares in excess of 300,000. Moreover, the fact that CCI bought only a few shares of Piper on the market after the termination of its cash tender offer is of little probative value. There are many possible explanations for this consistent with CCI's position that it would have purchased additional shares pursuant to the cash tender offer. For example, CCI might have been avoiding the expense of searching out small blocks of shares and the high transactional costs involved in purchasing them. We are satisfied that CCI had a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer.

The January letters to shareholders and the Grumman press release misled the Piper shareholders into believing that CCI's tender offer was undesirable. CCI's tender offer could be fruitful only if Piper shareholders believed that the price was currently a fair one and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares. See *Crane Co.* v. *Westinghouse Air Brake Co., supra*, 419 F.2d at 797. Moreover, these misleading statements most likely had a continuing adverse effect on CCI's attempts to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's exchange offer, many undoubtedly remembered and were influenced by the Piper



family's misleading January statements portraying CCI as a company that made inadequate and unfair offers.

We hold that, considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to CCI a fair opportunity to win the contest for control.

The June and July letters to Piper shareholders are a different matter. Although they omitted any reference to the arrangement between the Piper family and BPC whereby the family might gain a considerable amount of money if BPC were to be successful in gaining control of Piper, CCI protected itself against injury from such omission by sending letters to all Piper shareholders on June 16 exposing this non-disclosure by the Piper family. The nature of the Piper family's personal stake in the exchange offer was fully described. We therefore conclude that this omission was rendered harmless.

We hold that the record establishes that the injuries sustained by CCI were caused by the violations of the securities laws by BPC and its named officers, First Boston and its named officers and members of the Piper family.

(C) Violations of Rule 10b-6 Under 1934 Act

We turn now to CCI's claim that BPC's cash purchases between May 14 and 23 of three large blocks of Piper stock violated Rule 10b-6 under the 1934 Act, 17 C.F.R. §240.10b-6 (1972), and that such purchases caused injury to CCI. We hold that they did.

Rule 10b-6 prohibits bids for or purchases of a security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution". Included within the prohibition are bids for or purchases of "any right to purchase any such security". Clearly here, Piper stock, within the meaning of Rule 10b-6, was a "right to purchase" BPC stock.

On May 14, BPC purchased 78,600 Piper shares from Fund of Funds Proprietary Fund, Ltd. (FOF). On May 15, it purchased an additional 20,000 Piper shares from American Securities Corporation. And between May 16 and 23, it purchased an additional 21,600 Piper shares from Bay Securities Corporation. Thus, during this 10 day period and while its exchange offer for Piper shares was pending, BPC made three block purchases of Piper stock totalling 120,200 shares.

In our earlier en banc decision, we held that these purchases fell within the prohibition of the first sentence of Rule 10b-6. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 576-77 (2 Cir. 1970). Our reasoning was that such large purchases by BPC had a tendency to boost the market value of Piper stock to an artificial level. Since the purchases were made shortly after BPC announced on May 8 that it would make an exchange offer, reasonable investors were likely to have attributed the increase in the price of Piper stock to the soundness of BPC's exchange offer. As a result, the operation of the market would tend to raise the market price of the BPC package to align it with the inflated Piper price. Rule 10b-6 was designed to prevent such manipulation of a security which is "the subject of . . . [a] distribution". See *SEC* v. *Scott Taylor & Co.*, 183 F.Supp. 904, 907 (S.D.N.Y. 1959). We therefore concluded that Rule 10b-6 had been violated but we remanded for a determination of whether the exemption contained in Rule 10b-6(a)(3)(2) was applicable and what remedy, if any, was appropriate. 426 F.2d at 577.

On remand, BPC claimed the applicability of the exemption only with respect to its purchase from FOF on May 14. The district court held that "[a] literal reading of the exemption requires a finding that the [FOF] purchase,



like the others, was not exempted". 337 F.Supp. at 1141. BPC does not contest this holding. The court concluded, however, that these were "technical violation[s]" and that there was not enough substance to them to support a finding that CCI was damaged. *Id.* at 1141-43. We disagree.

Since the violations constituted a manipulation of the price of BPC, the question arises whether CCI is a proper party to sue on this claim since it did not accept the BPC exchange offer.[28] CCI's contention is not that it was misled by BPC's purchases of Piper stock. It does contend that Piper shareholders were misled into accepting the BPC exchange offer because the Rule 10b-6 violations had a tendency to inflate the market value, and that CCI, as BPC's rival for the Piper stock, was thereby injured. Cf. *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2 Cir.), *cert. denied*, 389 U.S. 970 (1967). The SEC's policy statement of May 5 announced that purchases of stock of a target company during the pendency of an exchange offer are forbidden by Rule 10b-6 in order to promote fairness in contests for control. We find nothing in the language or history of Rule 10b-6 to suggest that only purchasers of the manipulated stock are entitled to bring an action.[29] We hold that CCI has a right of action to complain that BPC's Rule 10b-6 violation caused it injury.

The remaining question is whether BPC's cash purchases misled the Piper shareholders by artificially boosting the market value of the BPC securities and, if so, whether this deception was in fact the cause of the injury for which CCI seeks redress. The district court held that, although the

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28 The district court held that CCI had standing to sue on the Rule 10b-6 violation. 337 F.Supp. at 1133.

29 Rule 10b-6 does not contain the clause, "in connection with the purchase or sale of any security", which limits a cause of action under Rule 10b-5. *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2 Cir.), *cert. denied*, 343 U.S. 956 (1952).

purchases were literally proscribed by Rule 10b-6, Piper shareholders were not necessarily misled because, among other reasons, the purchases were not designed to produce a stimulating effect, were not radiated into the general market, and were not made through an exchange or regular broker-dealer. 337 F.Supp. at 1142-43. We hold that, since the purchases were in violation of Rule 10b-6 and were not exempt, CCI is entitled to recover damages from BPC based on such violations.

Either the purchases were prohibited by the Rule or they were not. If they were, as we have held, then presumptively a stimulating effect was produced which misled the public. Rule 10b-6 was drafted by the SEC on the basis of its considerable expertise and familiarity with market factors. It determined that a purchase that meets all the criteria set forth in the Rule will have a false prodding effect on the price of the distributed security and therefore should be outlawed. On the basis of the facts presented here, we refuse to second guess the wisdom and rationale of the Rule. Cf. *H. Kook & Co.* v. *Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93, 98 (2 Cir. 1969). Piper shareholders presumptively were deceived by a material alteration in the value of the exchange package. They no doubt were influenced by this deception to take advantage of what seemed to be a highly favorable BPC exchange offer.[30]

BPC's unlawful conduct denied CCI a fair chance to compete for control of Piper. We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law, but it is a fact that BPC obtained control through its unlawful acts. Its May purchases of large

30 CCI need not prove actual reliance by Piper shareholders. Rule 10b-6 creates a presumption that illegal purchases will substantially inflate the price of the security. A reasonable investor is likely to rely on this inflation in deciding to accept the exchange offer. See *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 385; *Affiliated Ute Citizens* v. *United States*, *supra*, 406 U.S. at 153-54.



blocks of Piper stock operated in the market to make BPC's exchange offer deceptively attractive. Success on that offer was necessary to achieve control. More important, the unlawful purchases themselves constituted about 7% of the outstanding shares of Piper. BPC eventually acquired only 51%. Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings.

We hold that CCI is entitled to recover damages from BPC based on its violations of Rule 10b-6.

### (D) Relief To Be Granted For Violations of Section 14(e) and Rule 10b-6

Having held that all defendants violated Section 14(e) and that BPC violated Rule 10b-6, we turn now to the form of relief to which CCI is entitled.

Normally, the form of appropriate relief should be left for determination by the district court upon remand, as was done after consummation of mergers achieved as a result of securities laws violations in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-89 (1970); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433-35 (1964); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 803-04 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

In the instant case, however, we believe that it is incumbent upon us to provide specific guidance to the district court as to the form of relief to be granted upon remand. There are several reasons for this. First, as indicated above, the district court did not reach the issue of relief to be granted, since it held that most of the alleged securities laws violations had not been proven, that those proven had not caused injury to CCI and that CCI had failed to prove its claim for damages. Second, under the

posture of the case in the district court, CCI limited its claim for relief to damages, but on appeal has pressed its claim for equitable relief as well as damages. Third, this litigation has been under way for more than three years, with one appeal already having been decided en banc by our Court. And, finally, certain of the questions presented are of first impression, chiefly the application of the anti-fraud provisions of the federal securities laws to a contest for acquisition of a controlling stock interest in a target corporation.

In short, the district court deserves guidance from this Court on the form of relief to be granted. We therefore order, upon remand and after appropriate opportunity has been afforded to the parties to be heard on the issue of relief, that the district court should grant at least the following relief:

(1) *Damages*

Piper has come under the dominance of BPC, with many of its management positions being assumed by BPC officers. It has been operated that way for two or three years. Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages.

We have held that the unlawful conduct of the Piper family,[31] of BPC and its named officers, and of First Boston

31 The Piper Aircraft Corporation itself was not a perpetrator of the violations of the securities laws. The evidence shows that members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. The district court correctly characterized Piper as "the prize in the battle, not a contender". 337 F.Supp. at 1146. We agree that no liability is to be imposed on the Piper Aircraft Corporation.



and its named officers has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. Since the conduct of each of the defendants, through their violations of the securities laws, contributed to the success of BPC's takeover attempt, a judgment should be entered assessing damages against all defendants jointly and severally. See Section 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78r(b) (1970).

(2) *Equitable Relief*

We further hold that BPC should be denied the fruits of obtaining Piper shares illegally. We therefore direct that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer.[32]

While we believe that the foregoing relief should be sufficient, our direction that the two provisions indicated above should be included in the judgment to be entered on remand is not intended to foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement our decision herein, after affording the parties an opportunity to be heard on the issue of relief.

The judgment of the district court on the appeal in No. 72-1064 is reversed and the case is remanded.

32 This injunctive provision of course would not apply to those Piper shares which are retransferred to former Piper shareholders who take advantage of the rescission order referred to below.

## III.

## BANGOR PUNTA CORPORATION v. CHRIS-CRAFT INDUSTRIES, INC. (NO. 72-1120)

In this second of three related appeals, BPC appeals from the district court's dismissal after trial, 337 F.Supp. 1147 (S.D.N.Y. 1971), of BPC's complaint which sought damages from CCI for alleged violations of the securities laws during the contest for control of Piper, BPC's principal claim being that, because of CCI's wrongful acts, BPC paid more than it otherwise would have paid to acquire control of Piper.

The complaint alleged violations of various provisions of the securities laws, including violations of Sections 9(a)(2) and 10(b) of the 1934 Act, 15 U.S.C. §§78i(a) and 78j(b) (1970); of Rules 10b-5 and 10b-6 promulgated under the 1934 Act, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1972); and of Section 17(a) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(a) (1970).

At the trial before Judge Pollack, BPC adduced no proof specifically as plaintiff in the instant case, but instead relied on the record in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064). After trial, the district court dismissed the complaint essentially on the grounds that the winner in a contest for control is not entitled to seek damages against the loser for alleged violations of the securities laws, that whatever BPC paid for control was attributable not to any alleged securities law violations by CCI but to BPC's own determination to obtain control, and that BPC had not supported with credible evidence its contentions that CCI had violated the securities laws or that such violations had caused injury to BPC.



Since we affirm the district court's dismissal of the complaint on the ground that BPC failed to adduce sufficient evidence to prove that the securities laws were violated, we do not reach the question whether BPC's allegations state a claim for relief under Rule 10b-5.

### (A) Claim of Manipulation of Prices of CCI Stock

The gravamen of BPC's claim is that CCI violated the securities laws in an attempt to gain control of Piper, and that these violations caused BPC to pay more for Piper stock than it otherwise would have been required to pay. BPC's prime contention is that CCI acted in concert with others unlawfully to inflate the market price of CCI stock at the time of CCI's exchange offer so that the offer would be deceptively attractive. This alleged inflation of CCI's price is said to have had the secondary effect of driving up the price of Piper stock.

To prove such price manipulation, BPC relies upon inferences from a series of events. The relevant occurrences began in 1968 when Roger Spencer, a vice-president of Mitchell, Hutchins & Co., Inc. (a brokerage firm with close ties to several mutual funds), took an interest in CCI as a possible investment for Mitchell, Hutchins' clients. Spencer conducted an investigation of CCI that included several conversations with Herbert Siegel, President of CCI. Spencer subsequently recommended to several of his clients that CCI would be a sound investment. Several of these funds—Technology Fund, Inc. (Tech Fund), Investors Diversified Services, Inc. (IDS), Newton Fund, Inc. and Commonwealth Edison Pension Fund, Inc.—eventually were involved in the purchase of CCI stock.

IDS is a manager of a complex of mutual funds. Two of its managed funds, Investors Mutual, Inc. and Investors Stock, Inc., purchased 28,300 shares of ICC common in the period January 14-23, 1969. Another purchase of 53,900

shares was made on January 24 and 25. By January 31, the two funds had acquired 94,600 common and 24,700 of $1.40 preferred; another IDS fund had purchased 9000 common.

Tech Fund, a registered investment company, not only purchased many shares of CCI stock, but also, as discussed above in our opinion in No. 72-1064, sold 101,100 shares of Piper to CCI on January 22 at $65 per share. On the same day that the Piper sale was completed, Tech Fund apparently decided to acquire 50,000 shares of CCI common and 10,000 shares of CCI preferred. These purchases were made between January 23 and February 25.

About this time, several other organizations also began making purchases of CCI stock in large amounts. American Investors Fund, Inc. (AIF) bought 22,500 common and $78,000 of 6% convertible debentures on four trading days beginning February 7. Keystone Custodian Services, Inc. (Keystone), fund managers, recommended that its Polaris and S-4 Funds buy CCI stock. The two funds purchased 130,000 shares of CCI common between January 20 and April 28. Between January 14 and February 25, these four organizations acquired 17% of CCI's outstanding common stock. These large purchases significantly contributed to a rise in the price of CCI common from 40 on January 13 to 58¼ on February 11, an increase of 45% over the average price during the preceding six weeks.

BPC maintains that these heavy market purchases by the funds were instigated by CCI through agreements and by providing inside information abouts its bids for Piper. Mitchell, Hutchins allegedly was the intermediary in this scheme. BPC's evidence of "agreements" clearly is insufficient. It contends that Tech Fund agreed to purchase CCI stock in return for CCI's buying Tech Fund's Piper holdings at a "premium price". This is pure surmise. There is no evidence of an actual agreement to that effect or that



the parties even discussed such an agreement. The price paid for the Piper stock, $65, was not a "premium" price since the next day CCI announced a large cash tender offer at the same price. IDS allegedly made purchases because it was a principal holder of CCI senior notes and therefore had an interest in the success of CCI's takeover attempt. This interest is not sufficient proof that IDS wilfully manipulated the price of CCI stock.

BPC also has failed to show that CCI gave illegal insider tips to spur market purchases of its stock. CCI did make known that it was planning to make acquisitions in the leisure-time field but this was a well publicized intention.[33] Indeed, most of the funds' purchases were made after CCI announced its tender offer. Any well informed investor by then would have known CCI's plans. It is evident that the funds purchased CCI heavily because their customary sources of information, such as Mitchell, Hutchins, revealed that CCI's acquisition of a company such as Piper probably would increase the value of CCI stock. It was a reasonable investment decision on their part, induced not by a desire to inflate artificially the value of CCI stock but by the prospect of gain. As we indicate below, these investments proved to be ill-advised and of little benefit to CCI or the funds. We cannot conclude on the basis of such evidence that the district court's findings were clearly erroneous.

BPC further contends that a manipulative intent is shown by the timing of the funds in disposing of their CCI holdings. CCI stock decreased in value substantially in the spring and summer of 1969, along with the general market decline. One of the three IDS funds sold its entire

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33 As we stated above in our opinion in No. 72-1064, CCI had sought financing in late 1968 by selling $26 million in debentures for the express purpose of making acquisitions in the leisure-time field. CCI also had made substantial investments in Warner Bros. and Harley-Davidson before purchasing Piper shares.

9000 shares in March because of CCI's difficulties with the Piper takeover. The other two IDS funds retained their CCI investments and sustained book losses of more than $4,600,000. Tech Fund, after selling 1600 of its shares on March 28, decided on April 1 to sell out its entire position. It accomplished this total disposal by selling gradually through July 7. It sustained a $691,000 loss on an investment of $3 million. AIF sold out completely between April 30 and May 20. The Keystone funds retained their holdings until August 1 and disposed of their entire position within the month, incurring a $3,625,048 loss on a $6,447,579 investment. These funds sustained a total loss of about $9,000,000 on their investments in CCI.

BPC argues that the funds did not immediately dispose of their CCI stock in a declining market because they intended to keep CCI's stock prices at an unlawfully inflated level. There is no discernible pattern in the sales that supports such a conclusion. It may be that one of the considerations which influenced the decisions of these investors was concern for the success of CCI's exchange offer. But, even if so, the record does not establish that it was the sole or even dominant consideration. It is apparent that each investor took the course of action that it believed would minimize its losses. Some were erroneously optimistic and anticipated that CCI would be successful in its quest for control of Piper. But most sold out early. A major portion of the shares was sold before and during the CCI exchange offer, thus impairing rather than promoting its success. We conclude that the district court was not clearly erroneous in refusing to find either a scheme to boost the price of CCI stock or a purpose on the part of CCI and the funds to manipulate the market in CCI shares.

Moreover, the facts as found by the district court, which are based on substantial evidence, do not establish that an unlawful market manipulation occurred. BPC's reliance



upon *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2 Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), is misplaced. There, Crane sought to take over Air Brake by a cash tender offer. Air Brake enlisted the aid of Standard to oppose the takeover. One of the means selected by Standard to achieve this objective was manipulation of Air Brake stock. On the last effective date of the tender offer, Standard, through a series of transactions, purchased on the market an extremely large number of shares at a price above the then market price, while at the same time secretly arranging for others to purchase at a much lower price many of the shares it had acquired. It was manifest from the secret deals and the intentional loss taken by Standard that it deliberately maneuvered the market price of Air Brake stock in order to defeat Crane's tender offer.

In the instant case, unlike *Crane*, the requisite purpose and wilfullness for a market manipulation claim cannot be inferred from the established facts. BPC places unwarranted reliance on circumstantial evidence. The funds bought CCI shares because they believed that it was a wise investment. The securities laws do not proscribe all buying or selling which tends to raise or lower the price of a security. The securities laws are designed to create "investors markets where prices may be established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73 Cong., 2d Sess. 11 (1934). So long as the investor's motive in buying or selling a security is not to create an artificial demand for, or supply of, the security, illegal market manipulation is not established. See Section 9(a)(2) of the 1934 Act, 15 U.S.C. §78i(a)(1970).

We hold that BPC failed to prove that the funds acted from improper motive, that CCI encouraged them to do so or that unlawful market manipulation in fact occurred.

(B) Claim of Illegal Warehousing

BPC claims that, at the direction of CCI, Tech Fund instructed its affiliates to purchase and illegally "warehouse" Piper stock which these affiliates later tendered to CCI.

BPC bases this claim on the following facts. After CCI announced its exchange offer, it continued to purchase Piper shares on the market. On April 7, the SEC warned CCI that these purchases violated Rule 10b-6. CCI heeded this warning and ceased making purchases. On April 17 and 18, Tech Fund ordered two of its affiliates to start buying Piper stock. They acquired 14,700 shares by April 25. Of this total, 9,900 shares were tendered on June 5 to CCI pursuant to its exchange offer.

BPC argues that Tech Fund purchased these securities at the encouragement of Spencer of Mitchell, Hutchins, who supposedly acted under instructions from CCI. Tech Fund evidently did purchase the stocks because it hoped to take advantage of a favorable CCI exchange offer. Tech Fund also apparently relied at least in part upon the representations of Spencer. The record, however, does not support BPC's assertion that CCI arranged this purchase by Tech Fund or that it made promises of value to Tech Fund with regard to its exchange offer.

We hold that the district court was not clearly erroneous in rejecting BPC's claim of illegal warehousing.

We have considered BPC's other claims on this appeal, such as CCI's alleged violation of Section 17(a)(2) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(a)(2)(1970), and have concluded that they are without merit.

The judgment of the district court on the appeal in No. 72-1120 is affirmed.



## IV.

## SEC v. BANGOR PUNTA CORPORATION
## (NOS. 72-1053 and 72-1140)

These are cross-appeals from a judgment entered November 17, 1971 after trial on the merits. 331 F.Supp. 1154 (S.D.N.Y. 1971). The SEC appeals from those provisions of the judgment which denied a permanent injunction against further violations of the securities laws and which imposed a condition upon BPC's rescission offer to former Piper shareholders. BPC cross-appeals from those provisions of the judgment which found BPC to have violated the securities laws and which ordered BPC to offer rescission to former Piper shareholders.

The SEC brought this action pursuant to Sections 20(b) and 22(a) of the 1933 Act, 15 U.S.C. §§77t(b) and 77v(a) (1970), and Sections 21(e) and 27 of the 1934 Act, 15 U.S.C. §§78u(e) and 78aa (1970). The complaint alleged that BPC's registration statement and prospectus for its Piper exchange offer violated the registration statement and prospectus requirement provisions of Sections 7 and 10(a) of the 1933 Act, 15 U.S.C. §§77g and 77j(a) (1970); and the antifraud provisions of both acts, Section 17(a) of the 1933 Act. 15 U.S.C. §77q(a) (1970), Section 10(b) of the 1934 Act, 15 U.S.C. §78j(b) (1970), and Rule 10b-5 promulgated under the 1934 Act, 17 C.F.R. §240.10b-5 (1972).

After trial of this action at the same time as the other two actions (the subject of the appeals in Nos. 72-1064 and 72-1120), the district court concluded that BPC had violated the securities laws, including the antifraud provisions of the 1933 and 1934 Acts. The court ordered that BPC offer rescission to all former Piper shareholders who had accepted BPC's exchange offer, subject to a condition which we shall discuss below. The court denied the SEC's

request that BPC be permanently enjoined from further violations of the securities laws.

On the SEC's appeal, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On BPC's cross-appeal, we affirm.

(A) Injunctive Relief

The district court concluded that, although BPC had violated the securities laws in disseminating a materially misleading registration statement and prospectus for a securities exchange offer, nevertheless "the Commission has failed to carry its burden to establish, with persuasive evidence, that Bangor-Punta, its officers, directors and employees have *a propensity or natural inclination* to violate the securities law." (emphasis added.) Accordingly, the court denied a permanent injunction against further violations. 331 F.Supp. at 1163. I disagree.[34]

Based upon the SEC's stautory responsibility under the 1933 and 1934 Acts[35] to seek a permanent injunction "[w]henever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation" of the provisions of such Acts or any rule or regulation promulgated thereunder, I believe that the district court erred in denying a permanent injunction and I emphatically dissent from the opinion of Judge Gurfein affirming the denial of

34 On this issue—the district court's denial of injunctive relief in the SEC's enforcement action—I would reverse the district court and remand with directions that it issue an injunction against further violations of the securities laws by Bangor Punta, its officers, directors and employees. But my opinion on this issue, I regret to say, has emerged as the minority view. The majority view is set forth in Judge Gurfein's separate opinion at pages 4991, 4966 *infra*.

35 Section 20(b) of the 1933 Act, 15 U.S.C. §77t(b) (1970); Section 21(e) of the 1934 Act, 15 U.S.C. §78u(e) (1970).



such injunction. The grounds of my dissent are as follows.[36]

(1) *Erroneous Standard*

First, the district court applied an erroneous standard in determining whether a permanent injunction should issue. The court held, as stated above, that the SEC had failed to show that "Bangor Punta, its officers, directors and employees have *a propensity or natural inclination* to violate the securities law." (emphasis added). It uniformly has been held that the correct standard is "whether there

36 As to one finding of the district court with respect to which the SEC challenges the denial of an injunction, although the issue is a very close one, I am inclined to agree with my colleagues that the district court's finding of fact should not be set aside as clearly erroneous. Fed. R. Civ. P. 52(a); *Heyman* v. *A. R. Winarick, Inc.*, 325 F.2d 584, 589 (2 Cir. 1963).

The SEC contends that the court erred in refusing to find that BPC had decided by the early summer of 1969 to sell its BAR holdings to Amoskeag for $5 million and chose deliberately to postpone effectuating the sale in order to avoid recording and disclosing a loss of $13 million. Upon reviewing the entire evidence with respect to this aspect of the matter, however, I agree that we are not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The SEC relies heavily upon the testimony of Dumaine to establish that a deal had been made prior to the close of the Piper exchange offer. The district court, which observed the demeanor of the witness, concluded that his testimony was not worthy of belief. On such a determination, I agree that we should not substitute our views for those of the trial judge who heard and saw the witness. Nor do I believe that we should find unreasonable the court's inferences drawn from undisputed evidence that BPC's delay in consummating the deal resulted from a prudent business decision to ascertain, through a complete investigation of legal and accounting ramifications before closing the deal, the precise impact of the sale.

Since the issue on this point is very close, I could well be wrong and the SEC may be correct in urging that the district court's finding was clearly erroneous. Nevertheless, for the reasons stated above, I prefer to resolve any doubt on this point in favor of the correctness of the district court's finding—especially in view of the more persuasive reasons set forth below which in my opinion demand reversal of the district court's denial of an injunction.

is a reasonable likelihood that the wrong will be repeated". *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2 Cir. 1972).[37] See *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *SEC* v. *Culpepper*, 270 F.2d 241, 249 (2 Cir. 1959). There is a meaningful difference between the standards of "propensity or natural inclination to violate" and "reasonable likelihood that the wrong will be repeated". The district court's failure to perceive this difference and my colleagues' sanctioning the application of an erroneous standard cuts to the core of the error committed. This leads to the second ground of my dissent.

(2) *Requirement of Intent*

Second, in sanctioning a standard of "propensity or natural inclination to violate the securities laws", my colleagues have engrafted upon the standard required for an injunction in an SEC enforcement action a requirement not

37 In *SEC* v. *Manor Nursing Centers, Inc., supra*, we expressly *rejected* appellants' contention that "the SEC must show more than a reasonable likelihood of future violations. . . . [A]ppellants must be shown to have a propensity or natural inclination to violate the securities laws." 458 F.2d at 1101.

In *Manor Nursing*, referring to the district court's opinion below in the instant case, we assumed that "it was not purporting to apply a new standard for the issuance of an injunction" in view of the court's reliance upon our decision in *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2 Cir.), *cert. denied*, 404 U.S. 1005 (1971). 458 F.2d at 1101.

Since the author of the present opinion also was the author of *Manor Nursing*, I can state unequivocally that the *Manor Nursing* court was totally unfamiliar with the record in the instant case, other than the district court's opinion reported at 331 F.Supp. 1154; and of course, as with Judge Pollack when he denied the permanent injunction in the instant case, we did not know at the time of our decision in *Manor Nursing* that the conduct of Bangor Punta here ultimately would be held, as we now hold, to constitute serious violations of the antifraud provisions of the federal securities laws—including such conduct as recklessly failing to disclose in its registration statement and prospectus the true value of the BAR: hardly a minor omission, but a $13 million one.



required by Congress, by the Supreme Court or by our Court (prior to today's decision), namely, a *purposeful* violation of the securities laws and a showing of *intent*. In Judge Gurfein's words (p. 4994 *infra*), "In the last analysis we are dealing with *intent* . . . ." (emphasis added). I disagree.

To impose upon the SEC the burden of showing evil motive or intent to violate the securities laws as a condition to obtaining an injunction against further violations would be tantamount to converting a civil injunction enforcement proceeding into a criminal prosecution. As the Supreme Court said in reversing our Court in *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963):[38]

> "This, of course, is but another way of putting the rejected argument that the elements of technical common-law fraud—particularly intent—must be established before an injunction requiring disclosure may be ordered. It is the practice itself, however, with its potential for abuse, which 'operates as a fraud or deceit' within the meaning of the Act when relevant information is suppressed. . . . Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which

38 *Capital Gains* involved the showing the SEC was required to make in order to obtain an injunction compelling disclosure under the Investment Advisers Act of 1940. The Court held that "Congress, in empowering the courts to enjoin any practice which operates 'as a fraud or deceit' . . . did not intend to require proof of intent to injure . . . . Congress intended [the Act] to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes." 375 U.S. at 195.

This applies a fortiori to the remedial injunctive provisions of the 1933 and 1934 Acts pursuant to which the SEC brought the instant injunction action. See note 35 *supra*.

> predatory practices best thrive. To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute." 375 U.S. at 200.

The absence of any such requirement of intent for an injunction under Section 20(b) of the 1933 Act or Section 21(e) of the 1934 Act is borne out by the provision in each section, immediately following the authorization for the SEC to seek an injunction, empowering "[t]he Commission [to] transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings. . . ." 15 U.S.C. §§77t(b) and 78u(e) (1970). In short, Congress itself has made separate provision for the SEC to institute civil injunction proceedings on the one hand, and to submit criminal reference reports to the Attorney General on the other hand; a showing of intent clearly is required for the latter, and equally clearly not required for the former.

(3) *Injunction to Protect Public Interest*

Third, the district court totally failed to recognize that an injunction in an SEC enforcement proceeding is sought to protect public rather than private interests. Doubts as to whether an injunction sought in such a proceeding is necessary to safeguard the public interest should be resolved in favor of granting the injunction. See *United States* v. *First National City Bank,* 379 U.S. 378, 383 (1965); *Mitchell* v. *Pidcock,* 299 F.2d 281, 287 (5 Cir. 1962). As Judge Smith recently observed, there is a vital distinction between the function of a district court in determining whether to issue an injunction in an action between



two private litigants and its function in an action by a government agency seeking an injunction to enforce an Act of Congress:

> "But the function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants. . . .
>
> The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained . . . ." *United States* v. *Diapulse Corporation of America,* 457 F.2d 25, 27-28 (2 Cir. 1972).

Not only did the district court fail to recognize this vital distinction between an injunction sought in an SEC enforcement action to protect the public interest and one sought to protect private interests in private litigation, but my colleagues appear also to have misapprehended the distinction.[39]

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39 For example, Judge Mansfield concludes his dissenting opinion thus (p. 5020, *infra*):

> ". . . I am convinced that a julgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures against any reasonable likelihood that BPC will engage in similar conduct in the future."

Such a notion that, once private interests in separate but related litigation have been resolved, the public interest is ipso facto protected and the need for an injunction in a separate SEC enforcement action is ipso facto eliminated, is a concept I find difficult to grasp. Surely it is a far cry from Judge Smith's perceptive recognition of "the function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy".

(4) *BPC's Past Violations*

Fourth, the primary factor in deciding whether past violations, now terminated, constitute a proper basis upon which to find a reasonable likelihood that defendants will commit further violations is the nature of the past violations. *SEC* v. *Manor Nursing Centers, Inc., supra,* 458 F.2d at 1100-01; *SEC* v. *Culpepper, supra,* 270 F.2d at 250; *United States* v. *W. T. Grant Co., supra,* 345 U.S. at 633.

To me, nothing could be clearer than the fact that BPC's omissions from its registration statement and prospectus—again, not minor omissions, but including a $13 million one—constituted violations of the securities laws of the most flagrant character. It was inevitable that a large loss would occur and that such loss would have an enormous impact on a company of BPC's size and character. See *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2 Cir. 1968) (en banc), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969).

The district court found that such omissions were materially misleading. It nevertheless concluded that BPC did not *intentionally* or *purposefully* mislead and did not act in *bad faith.* It therefore denied the injunction. In my view, this was clearly erroneous.

On the basis of the district court's own findings, it follows as the day the night that BPC's actions were sufficiently culpable to portend that similar violations would occur in the future. A duty is imposed by law upon persons issuing securities to make a careful judgment as to what information a reasonable investor requires. BPC's management was aware of the circumstances indicating that the book value of the BAR was unrealistic. Cf. *SEC* v. *Great American Industries, Inc.,* 407 F.2d 453, 456-60 (2 Cir. 1968) (en banc), *cert. denied,* 395 U.S. 420 (1969); *Heit* v. *Weitzen,* 402 F.2d 909 (2 Cir. 1968), *cert. denied,*



395 U.S. 903 (1969). Nondisclosure of facts of a similar nature long has been condemned under the federal securities laws. BPC may not be heard to claim that its conduct in question had not been clearly declared unlawful prior to the instant suit. Cf. *SEC* v. *Keller Corp.,* 323 F.2d 397 (7 Cir. 1963).

Furthermore, BPC's misleading omissions from its registration statement and prospectus were made in the teeth of a consent decree which had been entered in the District Court for the District of Columbia on May 26, 1969 enjoining BPC from publicizing its exchange offer prior to filing a registration statement in compliance with "the registration provisions of the Federal securities laws." We recently have held that "[i]t was entirely proper to issue an injunction" when, inter alia, "appellants continued to violate the federal securities laws even after a consent decree had been entered enjoining them from such conduct." *SEC* v. *Koenig,* 469 F.2d 198, 202 (2 Cir. 1972).

Also here, as in *Koenig,* BPC and its named officers "have persisted in their contention that their past conduct was not improper". 469 F.2d at 202. This is another factor which was not taken into account, but should have been, by the district court in assessing the need for a permanent injunction. *SEC* v. *Manor Nursing Centers, Inc., supra,* 458 F.2d at 1101; *SEC* v. *MacElvain,* 417 F.2d 1134, 1137 (5 Cir. 1969), *cert. denied,* 397 U.S. 972 (1970); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 331 (1944).

(5) *BPC as a Conglomerate*

Fifth, where violations of the securities laws have been committed in the past by a corporation through its officers, the nature of the corporation and its officers is an important consideration in determining the likelihood of further violations. See *SEC* v. *Texas Gulf Sulphur Co., supra,*

446 F.2d at 1306; *SEC* v. *Mono-Kearsarge Consol. Mining Co.*, 167 F.Supp. 248, 261 (D. Utah 1958). BPC is a conglomerate with holdings in diversified fields. It long has been interested in new acquisitions. Tender offers of the type involved in this litigation are becoming a popular means of achieving acquisitions. There is a reasonable likelihood that BPC will become involved in similar tender offers in the future. Such involvement is likely also to entail more battles for control.[40] As we observed in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969), contests for control often are heated engagements in which both sides will resort to any means to achieve victory. It is when the temptation to violate the law is strongest that the greatest deterrence is necessary.

(6) *Abuse of Discretion*

Sixth, Judge Gurfein's opinion emphasizes that the standard for reviewing the district court's denial of injunctive relief is whether there was an abuse of discretion. I agree.

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40 Judge Gurfein's observation, "Nor do we believe that a conglomerate should be more harshly judged than others" (p. 4996 *infra*), strikes me as missing the point. I do not suggest that BPC be judged by any different *standard* than others. What I do say, as the cases hold, is that the *nature of a corporation* which has committed flagrant violations of the securities laws in the past has an important bearing upon the likelihood of recurrence of such violations. Any judge who has been required to study in depth the operations, and particularly the acquisitions, of a major conglomerate, knows that tender offers are an integral part of their way of life. See *United States* v. *International Telephone & Tel. Corp.*, 306 F.Supp. 766 (D. Conn. 1969), and 324 F.Supp. 19 (D.Conn. 1970). And any realistic estimate of the conduct of participants such as BPC and its officers in a tender offer contest, *based on their past performance in such a contest*, will acknowledge that "[t]hey act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side." *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 948.



I stand four square on what I said in *SEC* v. *Manor Nursing Centers, Inc.*, *supra*:

> "In an action, such as the instant one, where the SEC sought injunctive relief under Section 20(b) of the 1933 Act, 15 U.S.C. §77t(b) (1970), and under Section 21(e) of the 1934 Act, 15 U.S.C. §78u(e) (1970), a district court has broad discretion to enjoin possible future violations of law where past violations have been shown, and the court's determination that the public interest requires the imposition of a permanent restraint should not be disturbed on appeal unless there has been a clear abuse of discretion. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306-7 (2 Cir.), cert. denied, 404 U.S. 1005 (1971); SEC v. Culpepper, 270 F.2d 241, 250 (2 Cir. 1959). *Moreover, the party seeking to overturn the district court's exercise of discretion has the burden of showing that the court abused that discretion, and the burden necessarily is a heavy one.* SEC v. Culpepper, *supra*, 270 F.2d at 250; United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). In the instant case, we hold that appellants have not sustained that burden, for the record amply supports the district court's conclusion that the issuance of a permanent injunction was appropriate." (emphasis added) 458 F.2d at 1100.

Of course, our appellate review in *Manor Nursing* was addressed to the *grant* of an injunction in an SEC enforcement proceeding. Here we are reviewing the *denial* of such an injunction. Our scope of review would appear to be different. As Judge Waterman stated in *NMU* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2 Cir. 1972):[41]

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41 *Commerce Tankers* involved the denial of an injunction authorized pursuant to an Act of Congress, i.e. Section 10(*l*) of the National Labor Relations Act, 29 U.S.C. §160(*l*) (1970).

"Were this an appeal from the *grant* after an evidentiary hearing of [an] injunction our scope of inquiry could be limited by the 'clearly erroneous' test. However, when the appeal is from the *denial* of a petition for [an] injunction, it seems that, in light of the congressional policy favoring the grant of such injunctions in appropriate circumstances, our scope of review ought not to be so limited." (emphasis that of the Court) 457 F.2d at 1133-34.

In any event, whatever abuse of discretion standard be applied, in my view the district court's denial of an injunction here was a plain abuse of discretion—even on the record then before the court.[42] And surely, in view of our decision today holding that BPC's conduct constituted flagrant violations of the antifraud provisions of the federal securities laws—a holding of course unknown to the district court when it denied the permanent injunction—it would seem to me that at the very least we should remand the case to the district court, as we did in *SEC* v. *Texas Gulf Sulphur Co., supra,* "for a further determination below, in the light of the approach explicated by us in [our opinion filed today] as to whether, in the exercise of its discretion, the injunction against [BPC] which the Commission seeks should be ordered." 401 F.2d at 864.

42 Judge Grufein refers to "the experienced trial Judge below . . . a trial judge experienced in the securities field." I agree that Judge Pollack is indeed a trial judge thoroughly experienced in this field. And I yield to no judge on our Court in my firm belief that a district judge's exercise of discretion should not be reversed absent a clear showing of abuse; the record of decided cases in our Court bears this out.

But it does strike me that all of this begs the question. After more than a dozen years on the federal bench—mostly as a district judge—I have never discerned any notable reticence on the part of federal appellate judges about reversing a district judge upon a showing of abuse of discretion. Indeed, the benchmark of a truly competent district judge—as with Judge Pollack in the instant case—is his capacity to insure that the record demonstrates with crystal clarity the basis of his exercise of discretion, so that a reviewing court can determine abuse or the absence of abuse.



(7) *Mischievous Precedent*

Finally, today's judgment and opinion by the majority of this panel affirming the denial of a permanent injunction in this SEC enforcement action, in my opinion, will cause mischief in the enforcement of the federal securities laws.

The decision undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws. Its radiations will have their impact beyond this Circuit, since other courts look to us for guidance in this area.

In my view, no decision during the four decades the federal securities laws have been on the books will more effectively cripple the salutory enforcement program of the Securities and Exchange Commission than today's 2-1 decision by the majority of this panel on this issue.

I therefore respectfully but most emphatically dissent from the denial of a permanent injunction.

I would hold that the district court erred in denying the SEC's request for a permanent injunction against further violations of the securities laws; and I would remand with directions that the district court issue such an injunction.

(B) Rescission Order

The district court concluded that BPC would be required to make an offer of rescission to former Piper shareholders who accepted the BPC exchange offer. It directed the parties to submit an appropriate decree for the court's consideration. 331 F.Supp. at 1162.

The decree as entered provided, among other conditions not contested on appeal, that if the rescinding Piper share-

holder previously had sold the BPC securities received in the exchange offer, he must tender to BPC—in addition to the amount of securities he received plus dividends and interest paid (or due and payable) thereon—a cash payment equal to the excess, if any, of his sales proceeds from the original BPC securities over his cost of repurchasing the substitute BPC securities which he tenders to BPC. Both parties on appeal challenge the rescission order but for different reasons.

Before considering the propriety of the district court's order, we must decide whether a federal district court has the power, at the request of the SEC, to order rescission or restitution. The SEC has no express statutory authority to seek rescission, restitution, or other forms of equitable monetary relief. The Commission, however, may institute an action for injunctive relief and, once the equity jurisdiction of the district court has been properly invoked, the court has power to grant all equitable relief necessary under the circumstances. *SEC* v. *Manor Nursing Centers, supra*, 458 F.2d at 1103-04, and authorities there cited. See generally 1 Pomeroy, Equity Jurisprudence §236a (5th ed. 1941). As the Supreme Court said in an analogous situation:

> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief *in light of the statutory purpose.*" *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). (Emphasis added).

Accord, *SEC* v. *Texas Gulf Sulphur Co., supra,* 446 F.2d at 1307-08. Ancillary relief contributes to effective enforcement of the securities laws by depriving defendants of gains made through violations, by deterring future violations, and by increasing the overall efficiency of Rule 10b-5 and similar actions. See generally Note, *Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b-5,* 79 Harv. L. Rev. 656 (1966). Accordingly, we hold that the SEC can seek ancillary equitable relief where, as in the instant action, it is necessary to effectuate the statutory purpose.



BPC challenges the rescission order on the ground that a former Piper shareholder who has disposed of the BPC securities he received on the exchange offer should not be eligible for rescission. It argues that, since a Piper shareholder so situated could not obtain rescission if he brought the action himself, the SEC should not be permitted to seek rescission for him. The defect in this argument is that a Piper shareholder could purchase substitute shares and demand rescission if he brought his own rescission action. BPC maintains that a shareholder can sue only under §11 or §12(2) of the 1933 Act and that neither of those provisions permits rescission where the plaintiff no longer holds the shares. We need not decide whether BPC's interpretation of these provisions is correct because a defrauded shareholder also can bring suit for rescission and restitution under §10b of the 1934 Act, *Errion* v. *Connell*, 236 F.2d 447 (9 Cir. 1956), or under §29(b) of the 1934 Act, *Geismar* v. *Bond & Goodwin, Inc.*, 40 F.Supp. 876 (S.D.N.Y. 1941). Although the issue appears not to have been resolved, it is reasonable to assume with respect to such claims that a shareholder seeking rescission, even if he has disposed of his shares, should be permitted to tender substitute shares. See Restatement of Restitution §66(4) (1937); 3 Loss, Securities Regulation 1792-93 (2d ed. 1961, Supp. 1969). Furthermore, the SEC requests this rescission order not merely to compensate Piper shareholders for their loss but also to implement the broader statutory purpose of protecting the public

interest through effective enforcement of the securities laws. Limitations on the relief available in actions brought by private parties are not necessarily applicable to SEC enforcement proceedings. We hold that the district court was correct in permitting former Piper shareholders who had disposed of the BPC securities received on the exchange offer to tender substitute shares.

The SEC challenges the condition of the rescission order that requires a tendering Piper shareholder to return any profit he may have realized from the sale of his BPC securities and the purchase of substitute shares on the present market at a lower price. It is true that a prerequisite to the remedy of restitution is that a party seeking rescission must return any proceeds he has received from the transaction being rescinded in order to be placed in *status quo ante*. *Mott* v. *Tri-Continental Financial Corp.*, 330 F.2d 468, 470-71 (2 Cir. 1964). But the "proceeds" that must be returned are those received as consideration from the other party. That does not necessarily include profits realized from an interim sale resulting from fortuitous events which occurred subsequent to the transaction. It would be inequitable to require the tender of these profits where, as here, the other party is not required concomitantly to underwrite losses. The effect of the condition imposed by the district court is to render ineffective the rescission remedy.[43]

We hold that the district court erred in imposing the condition requiring restitution of interim profits; and we remand with directions that the judgment be modified by deleting that condition from the rescission order.

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43 There can be no expectation that the Piper shareholders will tender unless the market for their shares upon rescission is an open and free one. Such a market cannot exist where the price to be paid for the assignment of a right by each individual Piper shareholder is subject to different fact situations.



On its cross-appeal, BPC argues with regard to its exchange offer that it did not fail to disclose facts which a reasonably prudent investor would deem to be material. We have dealt with this issue at length in our opinion above in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.* (No. 72-1064). Our decision on this issue there is conclusive here.

On the SEC's appeal in No. 72-1053, to the extent the judgment is appealed from, we affirm in part, and reverse and remand in part. On BPC's cross-appeal in No. 72-1140, we affirm.

## SUMMARY

The following is a summary of our essential holdings in each of the three appeals.

In CHRIS-CRAFT INDUSTRIES, INC. v. PIPER AIRCRAFT CORPORATION, ET AL. (No. 72-1064). we hold that:

(1) Chris-Craft has standing under the antifraud provisions of §14(e) of the 1934 Act to sue defendants for damages.

(2) The record establishes violations of §14(e) on the part of all defendants, i.e. the Piper family defendants (not the Piper Aircraft Corporation); Bangor Punta Corporation and its named officers; and the First Boston Corporation and its named officers.

(3) Under appropriate principles of causation, the acts and conduct of each of the defendants in violation of §14(e) caused injury to Chris-Craft for which it is entitled to be compensated.

(4) Chris-Craft also is entitled to recover damages from Bangor Punta for the injury caused by Bangor Punta's cash purchases of large blocks of Piper

stock during the pendency of Bangor Punta's exchange offer for Piper shares, in violation of Rule 10b-6 under the 1934 Act.

(5) The judgment of the district court dismissing the complaint is reversed and the case is remanded with directions to enter judgment awarding damages and equitable relief in accordance with our opinion.

In BANGOR PUNTA CORPORATION v. CHRIS-CRAFT INDUSTRIES, INC. (No. 72-1120), we hold that:

(1) Bangor Punta failed to prove its claim of unlawful market manipulation of Chris-Craft stock.

(2) Bangor Punta failed to prove its claim of illegal warehousing of Chris-Craft stock.

(3) The judgment of the district court dismissing the complaint is affirmed on the ground that Bangor Punta failed to adduce sufficient evidence to support its claims that Chris-Craft violated the securities laws or that such violations caused injury to Bangor Punta.

In SEC v. BANGOR PUNTA CORPORATION (Nos. 72-1053 and 72-1140), to the extent the judgment is appealed from, we hold that:

(1) The district court did not err in denying the SEC's request for a permanent injunction against further violations by Bangor Punta of the securities laws.

(2) The district court erred in imposing, as a condition to its order that Bangor Punta offer rescission to all Piper shareholders who had accepted Bangor Punta's exchange offer, the requirement that such shareholders make restitution of any interim profits realized by them on the sale of their Bangor Punta



securities; and the case is remanded with directions that the judgment be modified by deleting that condition from the rescission order.

(3) On Bangor Punta's cross-appeal, we affirm the judgment of the district court.

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CHRIS-CRAFT v. BANGOR PUNTA

GURFEIN, *District Judge*, concurring.

I concur generally in Judge Timbers' scholarly opinion except as to the injunction sought by the SEC.

In view of the apparent disparity between the views of my brothers I respectfully comment on some of the points raised.

### STANDING

With respect to standing I am inclined to agree with Judge Mansfield that there is no constitutional question. My approach is, moreover, much closer to Judge Pollack's though I disagree with his conclusion. It seems to me he was right in approaching the problem as one of causation before considering the question of standing. If there is no causation standing becomes a rather abstract conception. Since the seven per cent illegally acquired by BPC caused it to win the contest, the loser has standing. I think it unnecessary to say that a defeated contender who won a booby prize of say, one per cent of the stock, would have standing simply because he entered the lists and lost.

### SCIENTER AND CAUSATION

I agree that some kind of scienter must be shown. But I do not think a litmus paper test of scienter will ever

be found. I am content to accept the general formulation that mere negligence will not suffice in a private action for money damages and that "recklessness that is equivalent to wilful fraud," *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (Friendly, *C.J.* concurring), is required for a violation of Section 14(e) as well as of Section 10(b). In modern times statutory construction grows case by case much as the common law did when more general rules of law were involved. And I venture to say that stability may be more easily attained by analogizing from decided cases whose facts are known than by guessing what may come within some general rule which must of necessity be inchoate if only for want of the gift of prophecy.

§10(b)(6)

With respect to the Section 10(b)(6) violation I limit my concurrence to agreement that there was such a violation as we held in *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 576-77 (2 Cir. 1970), and would hold that since the block purchases were necessary for control causation was established. I do not think we are required in this case to pass more precisely on the general question whether a purchase off the market that does not affect the tape causes price fluctuations and damage simply because it is a violation of Section 10(b)(6). On that question Judge Pollack, in my respectful submission, was right.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT-APPELLEE v. BANGOR PUNTA CORPORATION, DEFENDANT-APPELLEE-APPELLANT

INJUNCTIVE RELIEF

Judge Mansfield and I do not agree that Judge Pollack's denial of injunctive relief to the SEC against BPC should



be reversed. We respectfully suggest that the matter is not so clear that we should substitute our judgment for the judgment of the experienced trial Judge below who sat as a chancellor in equity. He heard the witnesses and had the opportunity by observation better to prophesy future conduct than we can on this printed record.

The days are long since past when appellate courts in the federal system in equity cases reviewed findings of fact *de novo*. The scope of appellate review is more sharply limited even in causes that would have been formerly classed as proceedings in equity. The findings of the trial Court must be clearly erroneous or they will not be set aside. Fed.R.Civ.P. 52(a).

Specifically, the test for review of the denial of injunctive relief is whether there has been an abuse of discretion. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633, 634 (1953). In *United States* v. *W.T. Grant Co.* the Supreme Court said that for reversal "the Government must demonstrate that there was no reasonable basis for the District Judge's decision." 345 U.S. at 634. And this Court has recognized that this rigorous limitation on appellate review applies to SEC actions for injunctive relief as well. As was said in *SEC* v. *Manor Nursing Centers Inc.*, 458 F.2d 1082, 1100 (2 Cir. 1972), "the party seeking to overturn the district court's exercise of discretion has the burden of 'showing that the court abused that discretion, and the burden necessarily is a heavy one.' *SEC* v. *Culpepper, supra*, 270 F.2d at 250; *United States* v. *W.T. Grant*, 345 U.S. 629, 633 (1953)." I think we lose sight of these accepted principles if we reverse and order the issuance of a permanent injunction in this case.

Here Judge Pollack found against the SEC on its primary contention. He found that there was no purposeful withholding of the completion of the Dumaine negotiation

until the contest for Piper was over. 331 F.Supp. 1154 at 1160. We cannot set this finding aside as clearly erroneous on this record. This is a weighty finding by a trial Judge experienced in the securities field. In the last analysis we are dealing with intent and must seek to determine whether there is a likelihood of recurrence of unlawful activity and a need for a prophylactic against recidivism. Who is better able to determine such things than the Judge who saw and heard the witnesses and got the feel of what happened?

In the opinion in the other cases decided today, we accept the District Court's "inferences drawn from undisputed evidence" that the delay in consummating the deal resulted from a prudent business decision to investigate the legal and accounting impact of the sale.

Judge Timbers argues that there is a "core" difference between the standard of "a propensity or natural inclination to violate the securities law" attributed to Judge Pollack, and the test offered by Judge Timbers' opinion "whether there is a reasonable likelihood that the wrong will be repeated." Of course the statute expresses it as "any person [who] is engaged or about to engage in any acts or practices which constitute or will constitute a violation." The use of either test, if indeed they differ except in verbiage, is not the subject of immutable statutory command. We do not see sufficient difference in the standards juxtaposed to find that the District Court erred as a matter of law. Indeed, if one wished to be finicky, Judge Timbers' formulation is the more limited—"*the* wrong will be repeated" implying a rather narrowly repetitive violation while the propensity standard covers a multitude of violations (emphasis supplied). We emphasize that we are not in the least interested in limiting the basis for an SEC injunction as a matter of general rule.



The dissent also misinterprets our view on intent. We are not limiting our injunctive relief to common law fraud as is implied from the citation of *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1968). Nor are we eliminating reckless conduct that may be tantamount to culpable negligence from the proper basis for injunctive relief at the instance of the Commission. Nor do we treat as unimportant the public interest as is suggested.

Since we do not deny that in a proper case even sustained recklessness can be the basis for injunctive relief there is no such divergence of opinion in the abstract as Judge Timbers suggests. We repeat that we are not the finders of fact. The impact of our decision is, by its terms, limited to the scope of appellate review.

In *Texas Gulf Sulphur, supra,* this Court simply remanded "the cause as to it [Texas Gulf Sulphur Company] for a further determination *below,* in the light of the approach explicated by us in the foregoing opinion, as to whether in the exercise of *its* discretion, the injunction against it which the Commission seeks should be ordered" (emphasis supplied). And as Chief Judge Friendly said in concurring: "Absent much clearer language than is found in the 1934 Act, the entitlement of a plaintiff to an injunction thereunder remains subject to principles of equitable discretion." He pointed out that Judge Bonsal had acted on the erroneous belief that "no violation of the Rule had occurred and he was without power to enjoin," but Chief Judge Friendly wrote: "If Judge Bonsal had denied an injunction on these grounds [i.e. 'no danger of repetition'], I see no basis on which we could properly have reversed him." 401 F.2d at 869.

In the instant case the District Judge found that the omission in the registration statement was material, but in his discretion, considering the public interest, he did not

enjoin because he did not believe there was likelihood of recurrence. 331 F.Supp. at 1162-63. We do not consider that to be such an abuse of discretion as to support reversal. And "abuse of discretion" it would have to be. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944).

Nor do we believe that a conglomerate should be more harshly judged than others. The issue is not whether it will seek other acquisitions but rather how it will go about doing them.

In any event sanctions need not be cumulative. Damages tend to have a didactic effect. The SEC has, through our decision in the companion cases now largely achieved its commendable purpose. Further to enjoin we think would be to add yet another star to the flag of a battle already won. The denial of an injunction is affirmed.

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MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in those results reached in Judge Timbers' opinion which represent the majority opinion as to issues other than injunctive relief, except that I dissent from the reversal of the district court's dismissal of CCI's suit against the Piper family defendants.

I also concur in Judge Gurfein's opinion to the extent that it represents the majority decision affirming the denial of injunctive relief.

With due respect for my brother Timbers' exhaustive analysis of these complicated cases in his opinion ("main opinion" herein), I find myself in disagreement with some of his conclusions and reasoning. I would also limit our discussion to those legal principles necessary for adjudication of the issues presented rather than engage in unnecessary dicta in this sensitive area. The Supreme Court has urged that judicial construction of the anti-fraud provi-



sions of the federal securities laws be limited to what is essential for the decision at hand:

> "Although §10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them. We enter this virgin territory cautiously. The questions presented are narrow ones. They arise in an area where glib generalizations and unthinking abstractions are major occupational hazards. Accordingly, in deciding this particular case, remembering what is not involved is as important as determining what is. With this in mind, we turn to respondents' particular contentions." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969).

Several points discussed in Judge Timbers' opinion, while interesting, strike me as both irrelevant to the issues and as a source of possible confusion to readers. Other observations go much further than is necessary. With still others I must respectfully disagree. For these reasons I find it necessary to state my own differing views in this area. In doing so I shall follow the sequence of the main opinion.

*Function of Private Damage Suits*

I agree that the anti-fraud and anti-manipulation sections of the federal securities laws were designed to insure against distortion and falsity in the purchase and sale of securities, and that private damage suits based upon violation of those laws should be encouraged as a means of supplementing governmental action in the vigorous enforcement of those laws. See *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); Fleischer, *"Federal Corporation Law": An Assessment*, 78 Harv. L. Rev. 1146, 1172-79

(1965); Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules,* 66 Colum. L. Rev. 12; Lowenfels, *Private Enforcement in the Over-the-Counter Securities Markets; Implied Liabilities Based on NASD Rules,* 51 Cornell L.Q. 633 (1966). However, it is unrealistic and fanciful to suggest that through such suits "society can obtain the maximum amount of its preferred goods and services that our resources can produce."

Full disclosure may go far toward achieving a fair and honest marketplace for trading of securities. But honesty cannot be equated with efficiency in the use of funds or assets realized from a public issue or tender offer. One need only look at the dockets of our federal district courts to appreciate that bankruptcies of honest entrepreneurs are all too common.

*CCI's Standing*

With due respect for the views of the author of the main opinion, the issue before us is not whether "CCI has standing in a constitutional sense." If that were the issue, it could be settled by a one-line reference to the Supreme Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). The issue is one of statutory construction: Does §14(e) confer standing upon a defeated competitor for control to sue the successful party for damages based on its violation of the anti-fraud provisions of the securities acts?

The federal securities laws are silent on the subject of a private party's standing to sue. Indeed, neither §14(e) nor §10(b) or Rule 10b-5 state that purchasers, sellers, or exchangers of securities have the right to sue. However, their implied standing to sue has long since been judicially established, *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946). I would recognize CCI's standing solely on the ground that vigorous enforcement of the



anti-fraud provisions through private litigation, *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), calls for similar implication of a private right of action in favor of a defeated contestant against the successful bidder for control for damages caused by the latter's violation of that section, see *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970), especially in view of our willingness to permit the target corporation to seek relief against the offeror under §14(e). *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937 (2d Cir. 1969); *Butler Aviation International Inc.* v. *Comprehensive Designers, Inc.,* 425 F.2d 842 (2d Cir. 1970).

*Scienter*

It is generally agreed in this Circuit that some form of *scienter* is required to support a private damage claim based upon a violation of Rule 10b-5, compare *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 855, 863, 866-68 (Friendly, Ch. J., concurring) (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Kline* v. *SEC,* 394 U.S. 976 (1969), with *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1290 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), and while less than the specific fraudulent intent required to prove common law fraud will suffice, mere negligence is not enough, *Shemtob* v. *Shearson, Hammill & Co.,* 448 F.2d 442, 445 (2d Cir. 1971).[1] No reason has been advanced for a different standard in the enforcement of §14(e), the language of which is substantially the same as that found in §10(b) and Rule 10b-5.

In the present case, although an intent to defraud has not been shown, defendants' conduct amounted to more than mere negligence. Our answer to the question of

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1 See VI L. Loss, Securities Regulation 3883-88 (Supp. to 2d ed. 1969).

whether the proof was sufficient to satisfy the *scienter* requirement depends, therefore, upon the standard that is to govern the gray area between the extremes of specific fraudulent intent, on the one hand, and mere negligence, on the other. In my view that standard cannot be satisfactorily described in such abstract terms as "culpability," a generality frequently associated with any blameworthy or even criminal conduct, see I Working Papers of the National Committee on Reform of Federal Criminal Laws 123 (July 1970), much less as "fraud," "constructive fraud," "bad faith" or various gradations of "recklessness."

If there is to be a meaningful *scienter* standard, it should, if possible, be stated in more specific terms. Of course it might vary according to the existence of a fiduciary relationship, the burden of proof and the nature of the relief sought.[2] It might also take into account the nature and duties of the corporate posts held by the defendants, whether they are insiders or outsiders, and whether they are active or inactive participants. See generally Mann, *Rule 10b-5: Evolution of a Continuum of Conduct to Replace the Catch Phrases of Negligence and Scienter*, 45 N.Y.U.L. Rev. 1206 (1970). However, if we are unable to state a standard with some degree of precision, we should frankly confess that the only method of describing the element of *scienter* is by illustration rather than by categorization or rule of general application. See, e.g., Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562, 568 (1972). *Scienter*, like obscenity, would then simply be

2 We have indicated that the *scienter* requirement in suits for injunctive relief may be less strict than that in damage actions. *Mutual Shares Corporation* v. *Genesco Inc.*, 384 F.2d 540, 547 (2d Cir. 1967); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 863 (per Waterman, J.), 866-68 (Friendly, J., concurring) (2d Cir. 1968), *cert. denied sub nom. Kline* v. *SEC*, 394 U.S. 976 (1969); *SEC* v. *Great American Industries Inc.*, 407 F.2d 453, 463 (2d Cir. 1968) *(en banc)*, *cert. denied*, 395 U.S. 920 (1969) (concurring opinion of Kaufman, J.).



something recognized when seen, but not otherwise definable. Cf. *Jacobellis* v. *Ohio*, 308 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not attempt further to define the kinds of material. . . . But I know it when I see it. . . . "). But I believe that an applicable *scienter* rule can be formulated and defined.

Congress' use of the words "fraudulent," "deceptive" and "manipulative" in §14(e), when coupled with the partially similar language and the legislative history of the earlier-enacted §10(b), indicates that its purpose was not to punish mere negligence, see S. Rep. 792, 73d Cong., 2d Sess. 6 (1934), *Kohn* v. *American Metal Climax Inc.*, 458 F.2d 255, 279-80 (3d Cir. 1972) (concurring and dissenting opinion of Adams, J.), but that the law was aimed at misrepresentations or omissions involving *some degree of awareness* on the part of the corporate officer charged. If Congress had intended to impose absolute liability, subject to a "due diligence" or "good faith" defense, it could have used language similar to that found in §11 of the 1933 Act. If, on the other hand, it had intended to limit liability to willful and intentional misrepresentation, it could have used language similar to that found in §9(e) of the 1934 Act, 15 U.S.C. §78i(e) (making liable any person who "willfully participates" in the sale of securities, *inter alia*, through use of materially false or misleading statements, §9(a)(4)). The words "manipulative," "deceptive," and "fraudulent," as applied to statements or omissions, seem to have been intended to have a meaning similar to that later ascribed to them by the Commission, which has defined misleading statements or omissions as those "made with knowledge or reasonable grounds to believe that [they are] untrue or misleading," 17 C.F.R. §240.15c 1-2(b).

When §§10b and 14(e) are viewed against the entire background and purpose of the securities laws, the *scienter*

requirement would be satisfied upon a showing that the person charged knew the material facts misstated or omitted and could reasonably have been expected to appreciate their significance, see *Heit* v. *Weitzen,* 402 F.2d 909, 914 (2d Cir. 1968), or, if he did not know them, that he had reasonable cause to believe that there might be a material failure in disclosure and yet did not ascertain and disclose the facts even though he could have done so without any undue effort. In short, the *scienter* requirement would be met if the corporate officer (1) knew the essential facts and failed to disclose them, or (2) failed or refused, after being put on notice of a possible material failure in disclosure, to apprise himself of the facts under circumstances where he could reasonably have ascertained and disclosed them without any extraordinary effort.

In keeping with the broad remedial aims of the anti-fraud provisions of the federal securities laws such a standard of responsibility, while requiring proof of more than mere negligence, would not permit top corporate officers and those aiding and abetting them to escape liability by pleading ignorance where it can be shown that red flags putting them on notice or providing warning signals of either undisclosed or misrepresented facts of a material nature were readily apparent to all and that a routine check would have disclosed the misrepresentation. Such a test would also serve to differentiate §§14(e), 10(b) and Rule 10b-5 and §17(a) of the 1933 Act, 15 U.S.C. §77q, see *SEC* v. *Texas Gulf Sulphur, supra* at 867 (Friendly, Ch. J., concurring), on the one hand, from other provisions of the securities acts, such as §§11, 12(1), 12(2), 15 U.S.C. §§77k, 77l(1), (2), which impose upon persons charged the burden of proving "due diligence," see *Escott* v. *Barchris Construction Corp.*, 283 F. Supp. 643, 682-703 (S.D.N.Y. 1968).

Since the defendants in the present case had knowledge of the material facts misstated or omitted or had sufficient



notice of possible misstatements and could reasonably have ascertained the facts with a minimum of effort, the proof clearly satisfies the standard.

The majority opinion gives lip service to the foregoing test but adds a series of qualifications and characterizations that in my view are unnecessary and only serve to cast doubt upon the standard itself. The effect is to compound existing confusion as to the law in the area. Starting with the view that proof of *scienter* requires a showing of "culpability" the main opinion translates that term into "knowing or reckless failure" to ascertain and disclose those facts as to which the person sued has a "duty of disclosure." With respect to the nature and extent of this duty, we are provided with uncertain and apparently conflicting guidelines. Although the duty is described as one which requires the corporate officer to "act reasonably in discovering facts material to the [exchange] offer," *ante* at 38, that statement is promptly qualified by observations to the effect that "corporate officers have a reasonable area of discretion in determining how far to explore the facts and in deciding what facts need to be disclosed," *id.*, and that they must be allowed "considerable room" for such discretion, *supra,* n.22. With these latter comments I must respectfully disagree. In my view the test of materiality which was adopted by this court in *List, Heit* and *Texas Gulf Sulphur,* remains an objective one. If the corporate officer has knowledge of facts that are material according to that test, he cannot in his discretion decide not to disclose them without facing liability under §14(e).

*Reliance*

On the subject of what proof of reliance is required to establish causation, the Supreme Court has spoken definitively in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and in its sequel, *Affiliated Ute Citizens* v. *United*

*States,* 406 U.S. 128 (1972). In *Mills* minority shareholders of Electric Auto-Lite brought a derivative and representative class action challenging that company's merger with Mergenthaler Linotype Company on the ground that stockholders' approval had been obtained by means of a materially misleading proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and SEC Rule 14a-9. The alleged omission was the failure of defendants, who controlled 54% of Auto-Lite's voting shares and needed a two-thirds majority for approval of the merger, to disclose that they were nominees of Mergenthaler. The district court's award of summary judgment to the plaintiffs was reversed by the Court of Appeals on the ground that causation had not been established. The Supreme Court, in a characteristically lucid opinion by Justice Harlan, who spoke for a unanimous court, reversed the Court of Appeals, holding that where the "proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction," 396 U.S. at 385, proof of actual reliance on the material misstatement or omission need not be adduced. This principle was later summarized by Justice Blackmun in *Affiliated Ute Citizens, supra,* as follows:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. See *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 384 (1970); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC,* 394 U.S. 976 (1969); 6 L. Loss, Securities Regulation 3876-3880 (1969 Supp. to 2d ed. of Vol. 3); A. Bromberg, Securities Law, Fraud—SEC Rule 10b-5, §§2.6 and 8.6 (1967). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney & Co.,* 438 F.2d at 1172." 406 U.S. at 153-54.



In short, whatever may have been our earlier views as to the necessity of adducing positive proof of reliance, see, e.g., *Green* v. *Wolf Corp.,* 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), the gravamen of the offense is now the material misrepresentation itself, from which reliance by a reasonable investor may be inferred as a matter of law, thus rendering unnecessary proof of actual subjective reliance. The rationale behind this doctrine is that it "will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385.

The main opinion, following the lead of Judge Adams in *Kohn* v. *American Metal Climax Inc.,* 458 F.2d 255, 290 (3d Cir. 1972), construes *Mills-Ute* as creating a "*presumption*" of reasonable reliance "where it is logical to presume that reliance in fact existed." I disagree with this interpretation of the Supreme Court's decisions on the subject. At no point did that Court expressly or impliedly speak in terms of a "presumption." Use of that term naturally raises further questions: Is the presumption to be conclusive or rebuttable? If rebuttable, should not BPC be given an opportunity in the present case to rebut the presumption by offering proof that the percentage of Piper shareholders who did not rely upon its alleged

misrepresentations in tendering their shares was sufficient to enable BPC to achieve control? See Note, *Causation and Liability in Private Actions for Proxy Violations,* 80 Yale L.J. 107, 135-38 (1970).

In my view, unless reasonable reliance is found as a matter of law on the basis of the material misrepresentation, the Supreme Court's purpose in *Mills-Ute,* which was to avoid the impracticalities of determining how many votes or decisions to tender were affected, would be undermined. The door would still be open to extensive discovery and protracted proceedings aimed at establishing subjective non-reliance. The Supreme Court's decision not to remand for introduction of such proof in *Mills* or *Ute* indicates that it established a rule of law rather than a "presumption." Moreover, *Ute,* which involved 10b-5 claims, refutes the distinction relied on by Judge Adams in *Kohn, supra* at 289, that different standards of reliance and causation may be applicable to claims under §14(a) as opposed to those under §10(b).

In the present case BPC needed all but approximately 1% of the 7% gained as a result of its exchange offer in order to achieve its 51% control. Proof of non-reliance by all but 1% of the tendering Piper shareholders would be most unlikely. However, the main opinion, *ante* at 43, by obligating CCI to "show that there was a misrepresentation upon which the target corporation stockholders relied and that this was in fact the cause of CCI's injury" and by stating repeatedly that reliance will be "presumed," virtually invites an application for rehearing and remand to try the issue of reliance. I would clarify that issue now.

For these reasons my concurrence is based simply upon the view that, according to the principles established by the Supreme Court in *Mills* and *Ute,* CCI has established reliance as a matter of law in the present case.



*BPC's Violations of Rule 10b-6 of the 1934 Act*

In its denial of preliminary injunctive relief this court held that BPC's cash purchases of 120,200 Piper shares violated Rule 10b-6. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.,* 426 F.2d 569, 576-77 (2d Cir. 1970) (*en banc*). We there found Rule 10b-6 applicable to purchases of a target corporation's shares since such purchases might have a bullish radiating effect upon a pending exchange offer.

I concur in the view that since BPC's unlawful purchases of Piper shares enabled it to gain control of Piper, its conduct is actionable at the instance of CCI, which was thereby handicapped in its lawful competition for control. However, I cannot agree with the main opinion's view that BPC's purchases actually "operated in the market to make BPC's exchange offer deceptively attractive." There was no such proof. Nor do I accept the view that liability should be predicated upon the *"presumption"* that "Piper shareholders . . . were deceived" or that the "illegal purchases will substantially inflate" the price of the exchange offer. Unless the presumption were conclusive, BPC would be entitled to rebut it by offering proof that its cash purchases did not have any radiating effect upon the exchange offer.

For these reasons my concurrence is based solely on the ground that where a party acquires control of a target corporation through violation of applicable provisions of the securities acts and regulations promulgated thereunder (in this case Rule 10b-6), it is liable as a matter of law to a competitor for any damages caused by the illegal conduct.

*The Piper Family Defendants*

I concur in the conclusion that the Piper family defendants did not become liable to CCI by virtue of their participation in the May 8th press release announcing the BPC exchange offer. The statement of predicted value contained

in the release was not a material representation since the specific terms were contained in the registration statement filed shortly thereafter and the actual value of the package appeared as soon as the exchange offer became effective. I therefore find it unnecessary to decide whether a reasonable investor would have construed the $80 promised value to refer to market price of the security or to an appraisal of BPC's assets and earnings, or whether the archetypical investor should have been expected to make this differentiation from the bare words of the press release.

I also concur in the majority view that CCI has not proved its claim based upon the letters sent by the Piper family to Piper shareholders in June and July, 1969. Although these letters failed to mention the arrangement with BPC whereby the Piper family might gain a huge profit if BPC succeeded in acquiring control of the Piper Company, CCI promptly furnished the essential information to all Piper stockholders on June 16, 1969, before the BPC tender offer became effective. In view of the latter communication no reasonable investor would have accepted BPC's tender offer, which went into effect on July 18, 1969, in reliance upon the Piper family letters.

I must dissent, however, from the majority's failure to accord similar treatment to the claim based on the earlier letters written by the Piper family to Piper stockholders on January 27 and 28, 1969, and to the January 29 press release. I agree that these letters and press release were materially misleading and that a reasonable investor would have considered them important in deciding whether to accept or reject CCI's cash tender offer. Under the *Mills-Ute* test positive proof of reliance was unnecessary to establish causation. However, proof of damages is a separate question and requires more. As the Supreme Court stated in *Mills* v. *Electric Auto-Lite*, *supra* at 388-89:



> "On the other hand, where, as here, the misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, *damages should be recoverable only to the extent that they can be shown.*" (Emphasis supplied)

Applying this principle, CCI must show that it suffered some resulting loss. This it has failed to do. In making the January cash tender offer it agreed to purchase up to 300,000 Piper shares if tendered by February 3, 1969, and the district court found that it was not seeking more. 304,606 shares were tendered and purchased by CCI. Thus CCI exceeded its goal. It got more shares than it agreed to buy. No loss was suffered. Indeed it publicly stated that the cash tender offer had been a success.

Although CCI reserved the right to purchase more than 300,000 shares, it did not have sufficient funds to purchase any significant amount in excess of 300,000. Nor had "financing for . . . shares in excess of 300,000 . . . been arranged. . . ." (Testimony of C. Leonard Gordon, CCI's Vice-President and General Counsel). It is true that Mr. Gordon testified that Burnham & Co. would have provided additional financing if more than 300,000 shares had been tendered. However, the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds.

Under its agreement with its senior noteholders CCI had obligated itself not to have any unsecured current debt for bank loans in excess of a $15,000,000 revolving line of credit already obtained from the Philadelphia National Bank. The parties have stipulated that on February 3, 1969, the entire proceeds of this $15 million loan were re-

ceived by CCI and used by it to pay for Piper shares received by it on its January 24, 1969, cash tender offer, which closed on the same date the loan proceeds were received. (App. 825A). By February 4, 1969, CCI had purchased 540,000 shares of Piper stock at a cost in excess of $30,000,000. Its cash resources were virtually exhausted. Yet it did not seek waivers from its senior noteholders to permit additional borrowing. Indeed, the parties have further stipulated that no resolution authorizing CCI to borrow money or obtain credit from any other source to purchase Piper stock was ever sought or adopted. (App. 284A).

The reason for CCI's failure to seek additional loans was made clear by testimony of Mr. Woudhuysen, a partner of Burnham & Co., that the borrowing terms would have involved an 8¾% interest rate plus the issuance of 22,500 CCI warrants, exercisable at the market price of CCI common stock, for each million dollars borrowed on a two-year loan. Thus if CCI should borrow $20 million on such a two-year loan the total cost of the money, calculated according to a commonly accepted formula, would have been a staggering 43.11%!

In summary, having "shot its bolt" in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer. Indeed, although additional Piper shares were available in the market after the expiration date of CCI's tender offer, some at less than $65 per share,[3] CCI purchased only 9,100 shares between

[3] The Piper family January letters and press release regarding the Grumman transaction did not cause an increase in the market price of Piper shares. On the contrary the price declined from 64¼ per share on January 28 to 59⅝ on February 3.



February 3, 1969, and April 7, 1969, when the SEC advised it that such cash purchases during the pendency of its exchange offer (for which it had filed its Form S-1 with the Commission on February 27, 1969, to become effective May 15, 1969) would violate Rule 10b-6. The record further reveals that although Herbert Siegel, Chairman of the Board of CCI, knew as early as February, 1969, that Cornfeld's Fund of Funds Proprietary Fund, Inc. owned a large block of 78,600 Piper shares (later purchased by BPC), CCI made no effort to purchase it. Nor can CCI's lack of pursuit of the substantial Cornfeld block be attributed to a hypothesized desire to avoid the expense of searching out and purchasing small blocks of shares, as the main opinion suggests.

By March 19, 1969, when the Grumman deal collapsed, any possible effect of the Piper family's January 29, 1969, Grumman press release was completely dissipated, and by April 7, 1969, when the SEC took the position that further cash purchases were prohibited by Rule 10b-6, CCI could no longer claim that the January letters inhibited its purchase of Piper shares. By May 8, 1969, when BPC announced its tender package valued at $80, CCI could no longer contend that the Piper family's statement that Piper shares were worth more than $65 per share was misleading. Nor is the main opinion's fanciful assumption that the January letters "undoubtedly . . . influenced" Piper shareholders against accepting CCI's later *exchange* offer by casting a general pall of unfairness over CCI's reputation anything more than rank speculation.

Dogged by its inability to obtain financing that would have enabled it to purchase available Piper stock for cash in competition with BPC, CCI's efforts to obtain control by the cash offer route were doomed to failure. By the close of its second exchange offer on August 4, 1969, CCI owned 41% of Piper's outstanding shares as compared with

45% owned by BPC. Thereafter it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC.

Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision holding liable the Piper family defendants, caused any damage to CCI. The record is clear that the Piper communications, unlike the misleading statements in BPC's exchange offer or BPC's cash purchases in violation of Rule 10b-6, did not deprive CCI of a fair opportunity to compete in the contest for control or enable BPC to win that contest.

In short, since the record shows that CCI did not suffer any damages as a result of the Piper family's communications, I would affirm the dismissal of CCI's claim against the members of that family.

*First Boston and its Officers*

Where an underwriter participates in an exchange offering by assisting in the preparation of the registration statement and prospectus and by lending its name to the offer, I agree that §14(e) should be construed to impose upon him the same obligation as that imposed upon the issuer with respect to materially false or misleading statements or omissions, and that a damage suit should lie against the underwriter in favor of the competing bidder for control who suffered resulting damage. This conclusion is based solely upon the principle of implying liability as a means of promoting private enforcement of the antifraud provisions of the securities laws. See pp. 2-4, *supra*. However, unlike the main opinion on this issue, I gain no assistance in reaching that decision from §11(b) of the 1933 Act, 15 U.S.C. §77k(b) or from the Senate Report



accompanying §14(e), S. Rep. No. 510, 90th Cong., 2d Sess. (1968).

Since §11(b) *expressly* creates liability for materially misleading statements in a prospectus and then only in favor of purchasers of the security, I fail to find it of any help in *implying* liability under §14(e) in favor of nonpurchasers. Indeed it could be argued that the very fact that Congress expressly delineated the scope of liability in §11(b) militates against implying liability in §14(e). As for the Senate Report accompanying §14(e), I believe the authors would be startled to find that they had in mind underwriters such as First Boston Corp. when they referred generally to persons "engaged in making . . . tender offers or otherwise seeking to influence" the decision of investors with respect to such offers.

*Injunctive Relief*

I concur in the well-reasoned opinion of Judge Gurfein affirming the district court's denial of injunctive relief against violation by BPC of the Securities Act of 1933, 15 U.S.C. §77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.* 331 F. Supp. 1154.

The dissent's description of BPC's conduct as "most flagrant," its characterization of the district court's action as an "abuse of discretion," and its portrayal of our decision as a "mischievous precedent," simply ignore undisputed contrary findings of fact, which are fully supported by more than ample credible evidence. Such comments sacrifice controlling evidence and governing legal principles to insatiable zeal for use of an unjustified remedy, all in the name of vigorous enforcement of federal securities laws.

A review of the claims, evidence and findings demonstrates the wisdom of allowing Judge Pollack's decision denying injunctive relief to stand. The Commission's claim

was that BPC's registration statement and prospectus were materially deficient because of an alleged failure to disclose that it had decided to sell BAR at a price some $13.4 million below the figure at which it was carried on BPC's financial statements, and that BPC deliberately deferred the closing of the sale until its exchange offer was completed in order to avoid making the writedown that would be required if the sale were completed prior to or during the pendency of the offer. After receiving extensive proof on these issues, including the testimony of key witnesses who were personally observed and whose credibility was appraised by Judge Pollack, whose experience in the field of securities litigation at least matches if not exceeds that of this panel, he found that during the period when BPC's registration statement and prospectus were in effect (i.e., from July 18, 1969 to August 27, 1969) no decision to sell had been made.[4] However he further found that although there was no intent to mislead on the part of BPC in carrying BAR at $18.4 million on the balance sheet, that figure was obsolete to the point of being misleading and should have been qualified by reference to pending negotiations for sale at a substantially lower figure.[5] These crucial

4 "The Court has found that as of these dates Bangor Punta had not reached a decision to sell. The Commission's charge that the sale was a reasonable probability is made from the vantage point of hindsight. In the total perspective of events preceding the sale—including the last-minute attempts to convert it into a sale of assets—the Court cannot find that the sale was a reasonable probability at the time and to the people involved." (331 F. Supp. at 1160-61).

5 "The essential question is whether, despite the non-existence of intent or of reasonable probability, the circumstances surrounding the sale were such as to indicate that the $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading. The Court finds that it was—absent full disclosure of the factors affecting the ultimate decision to sell the BAR interest at a figure of $5 million—or even $7 million—and regardless of whether the sale was to be of stock or of assets.

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findings, supported by substantial evidence, cannot be rejected by us.

> "Our court is not disposed to overturn conclusions of the trier of facts which are based upon substantial evidence and upon a determination of the credibility of witnesses who have given conflicting versions of the facts. N.L.R.B. v. Chain Service Restaurant Employees, 302 F.2d 167, 171 (2 Cir. 1962); Wilson v. United States, 229 F.2d 277, 279 (2 Cir. 1956); Phelan v. Middle States Oil Corp., 220 F.2d 593, 598 (2 Cir.), cert. denied sub nom. Cohen v. Glass, 349 U.S. 929, 75 S.Ct. 772, 99 L.Ed. 1260 (1955). Moreover, where a trial has been had by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed.R.Civ.P. 52(a), 28 U.S.C." *Heyman* v. *AR. Winarick, Inc.*, 325 F.2d 584, 589 (2d Cir. 1963).

The dissent reluctantly concedes that the foregoing findings are supported by substantial evidence and confirms, in accordance with our decision in *SEC* v. *Manor Nursing Centers Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972), that in deciding whether to grant the extraordinary remedy of injunctive relief the district judge is vested with "broad discretion," which may be set aside only upon a clear showing of abuse of discretion. *United States* v. *W. T. Grant*

"I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the investing public by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to include facts necessary to render the statements in the registration statement and prospectus not misleading." *SEC* v. *Bangor Punta Corp.*, 331 F. Supp. 1154, 1161 (S.D.N.Y. 1971).

*Co.*, 345 U.S. 629, 633 (1953); *SEC* v. *Culpepper*, 270 F.2d 241, 249-50 (2d Cir. 1959); *SEC* v. *Torr*, 87 F.2d 446 (2d Cir. 1937); *SEC* v. *Okin*, 139 F.2d 87, 88 (2d Cir. 1943); *SEC* v. *Universal Service Ass'n*, 106 F.2d 232 (7th Cir.), *cert. denied*, 308 U.S. 622 (1939); *SEC* v. *Pearson*, 426 F.2d 1339 (10th Cir. 1970). However the dissent seeks to avoid these time-honored basic principles by suggesting that we may invoke a less stringent standard of review when the appeal is from *denial* of injunctive relief rather than from *grant* of such relief, relying upon *NMU* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2d Cir. 1972), which dealt with relief against unfair labor practices. That case is clearly distinguishable and has no application here. There we expressly noted that in deciding whether injunctive relief pending final adjudication by the NLRB in unfair labor practice cases is appropriate under 29 U.S.C. §160(1), "the role of the district court . . . is not to determine whether there has in fact been a violation of the Act but rather to determine whether the Regional Director could have *reasonable cause to believe* that the unfair labor practice charged had been committed and that its continuation ought to be enjoined." *Id.* at 1133 (emphasis in original). No such considerations control here, where a showing must be made that the person charged "is engaged or about to engage in any acts or practices which constitute or will constitute a violation," 15 U.S.C. §§77t(b), 78u(e).

We have found no instance where the standard for review of unfair labor practice suits has been applied to a suit by the SEC. On the contrary, in affirming the denial of injunctive relief in a suit by the SEC, the Tenth Circuit has taken the opposite view:

> "We are obliged to give great weight to the supported findings including the trial court's conviction that appellee did not intend further participation in the stock brokerage business in which he had not engaged for over a year before the hearing. See S.E.C. v. Franklin Atlas Corporation, supra 171 F. Supp. at 718. While we are persuaded that certain findings were clearly erroneous, we cannot say that there is a showing of abuse of the trial court's discretion in denial of the preliminary injunction and affirm that ruling." *SEC* v. *Pearson*, 426 F.2d 1339, 1344 (10th Cir. 1970).



With respect to the contention that Judge Pollack applied an erroneous standard in determining whether an injunction should issue, we would be engaging in petty semanticism if we were to reverse his decision because of his use of the words "propensity or natural inclination" instead of the phrase "reasonable likelihood that the wrong will be repeated." There is nothing magic about either phrase, as was recognized in *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972), where this court, referring to Judge Pollack's use in this very case of the terms "propensity or natural inclination to violate the securities laws," said: "In relying upon our decision in *Texas Gulf Sulphur*, which applied the reasonable likelihood standard, the district court demonstrated that it was not purporting to apply a new standard for the issuance of an injunction." I am not persuaded by the dissent's present attempt to explain away this earlier view of the standard adopted by Judge Pollack. Although there is a slight difference between the two clauses, both express substantially the fundamental condition precedent to the issuance of the extraordinary remedy of a permanent injunction, i.e., that there must be a showing of a cognizable risk of future violation, something "more than the mere

possibility which serves to keep the case alive." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).[6]

Nor was injunctive relief denied merely because of lack of wrongful intent. Judge Pollack expressly recognized (*supra* n.5) that absence of bad faith or of an intent or purpose to violate the securities laws will not necessarily excuse the defendant and that an evil intent need not be shown to grant relief. But the lack of such intent is an important factor to be considered by the court in assessing the risk of future violations. One who intentionally violates the law or shows a willful disregard for it is usually a poorer risk than one who acts without a full appreciation for the seriousness of his conduct. In addition, however, the court must weight all of those considerations which have been the traditional concern of the courts of equity, including the nature and extent of past violations, the effect on the public interest, and the impression on the trial judge made by the defendants who testified. *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943, 955-58 (S.D.N.Y. 1971).

The $18.4 million ascribed to BAR as "stated book value" on BPC's financial statements was an obsolete and hence misleading figure in view of pending negotiations for sale of the railroad at a much lower price. Some caveat or reference to the negotiations was required. However, I cannot agree that BPC's failure to furnish additional data was "flagrant." This characterization ignores the fact that under generally accepted accounting principles "stated book value" may properly be used in a financial statement

6 It appears to have been the SEC in its brief that first used the phrase adopted by Judge Pollack, "Because of this demonstrated propensity for violating the securities laws, the scope of the injunction against Bangor Punta should be broad," etc. Brief, p. 16, citing *SEC* v. *Raffer*, 1969-1970 CCH Fed.Sec.L.Rep. ¶92,632 (S.D.N.Y. 1970). It was this standard put forward by the Commission to which Judge Pollack was evidently responding below. 331 F. Supp. at 1162-63.



and is not viewed in the financial world as the equivalent of market value. A person able to read a balance sheet would probably have recognized that such "historical" cost did not necessarily represent current liquidating value. Furthermore, to write down the figure immediately to $5 million might have been treated by the SEC as speculative and possibly misleading, in view of the other forms of disposition of BAR that were still under consideration.

The other alleged "past violation" chargeable against BPC—that its May 8, 1969 press release constituted an offer to sell before any registration statement had been filed—constituted at most a technical violation. BPC filed its registration statement and preliminary prospectus shortly after the May 8th release and in consenting to a permanent injunction it did not admit any of the allegations of the complaint filed against it in the District Court for the District of Columbia.

Nor can I agree that BPC should be singled out for special injunctive treatment because it is a conglomerate. There is no evidence to support the view that it has "long been interested in new acquisitions" or that it will "become involved in similar tender offers in the future." We are not concerned here with a corporate behemoth of the size of ITT but with a corporate venture of relatively modest size. Even if BPC should become interested in further lawful acquisitions for what it conceives to be sound economic reasons, the totality of the circumstances do not indicate any likelihood that it will engage in further violations of the securities acts.

Aside from the foregoing factors I am convinced that a judgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures

against any reasonable likelihood that BPC will engage in similar conduct in the future.

The relief granted is bitter medicine which will be far more effective than a blanket injunction in deterring infraction of the law.



# United States District Court

SOUTHERN DISTRICT OF NEW YORK

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| CHRIS-CRAFT INDUSTRIES, INC., *Plaintiff*, *v.* PIPER AIRCRAFT CORPORATION, *et al.*, *Defendants.* | 69 CIV. 2227 (MP) |

## OPINION

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POLLACK, *District Judge:*

*The Context of the Case*

This case and its companion cases[1] arise out of the unsuccessful attempt of Chris-Craft Industries, Inc. (Chris-Craft), a diversified manufacturer of recreational products, to secure control of Piper Aircraft Corporation (Piper), a leading manufacturer of light aircraft. The Chris-Craft takeover attempt was resisted by Piper and by a competitor for the control, Bangor Punta Corporation (Bangor Punta), which eventually succeeded in acquiring more than 50% of the outstanding Piper shares. The bulk of Chris-

[1] *Bangor Punta* v. *Chris-Craft*, U.S.D.C. S.D.N.Y., 69 Civ. 2354 (MP), which is being decided this day; and *SEC* v. *Bangor Punta, et al.*, 331 F. Supp. 1154 (S.D.N.Y. 1971) (Pollack, *J.*).



Craft's complaints is based on charges that Bangor Punta's success was achieved and Chris-Craft's failure and its asserted damages were caused by deception of the Piper shareholders and of Chris-Craft in violation of various provisions of the federal securities laws and regulations.

Only a minor segment of the case involves charges that Chris-Craft was directly deceived by Piper. The balance of the case deals with charges of deceptions alleged to have been committed by Piper and Bangor Punta on public holders of Piper stock to induce them not to accept Chris-Craft's offers to acquire their stock by purchase or exchange. Chris-Craft claims also that Bangor Punta privately acquired three critical blocks of Piper stock during the pendency of an exchange offer in violation of an SEC Rule.

The contest for control of Piper was sophisticated and hard fought. The contenders were men accustomed to the handling of vast sums of public capital, were assisted by skilled professionals and were themselves seasoned in corporate tactics. It is not hard to detect personal overtones which added some passion and urgency to the contest. In addition, the conduct of both sides invoked the attention of the SEC and the New York Stock Exchange.

Thus, neither side can approximate itself to the position of an average public investor for whose express benefit, in dealing with others of superior knowledge (or the capacity to gain it), skill and resources, the law was designed. The Court does not intend to imply that contests for corporate control are to be unmediated by standards properly applicable under common law, federal legislation or regulation. However, substantial justice cannot be done by mere mechanical application of standards evolved to correct the imbalances of knowledge, skill and capacity for self-

protection which so often occur in securities transactions between members of the public and professionals. Nor can the Court be indifferent to the ultimate source from which the damages are claimed, in effect. (See *infra,* 35-37).

*The Major Events*

Piper stock was listed on the New York Stock Exchange. There were 1,641,890 shares outstanding. Chris-Craft began purchasing Piper stock just before the end of 1968. By January 21, 1969 Chris-Craft had acquired 102,600 shares of Piper stock on the New York Stock Exchange. On the next day it increased its holdings by purchasing 101,100 shares at $65 per share from Technology Fund, a midwest-based mutual fund; this made Chris-Craft's holdings total 13% of the issue. The market for the stock was then in the low fifties. On January 23, 1969, Chris-Craft announced a cash tender offer for Piper shares of $65 per share and it obtained 304,606 shares through tenders. It also bought an additional 38,000 shares approximately bringing its holdings by February 3, 1969, to 547,106 shares, a number barely short of one-third of the shares outstanding, at a cost of $34,677,000.

The Piper management (in essence the Piper family), which held some 31% of the outstanding Piper stock, reacted to the Chris-Craft tender offer by a communication to shareholders late in January to dissuade them from accepting the Chris-Craft tender offer. One of its statements complained of by Chris-Craft was that the Piper management considered the Chris-Craft $65 tender price inadequate. Chris-Craft charges that this was a misleading statement, based on the facts that Piper's investment bankers, First Boston Corporation, had advised Piper that a $65 price was fair and, furthermore, that on January 29, Piper had announced an agreement to sell 800,000 unissued Piper shares to Grumman Aircraft Company at $65 per



share.[2] The Grumman agreement was not consummated and the additional shares were not issued.

On February 27, Chris-Craft filed with the Securities and Exchange Commission ("Commission") an S-1 registration statement as a step in a proposed offer of exchange of a Chris-Craft package of securities for Piper stock. (The statement did not become effective until May 15.)

On March 22, Piper issued 469,199 authorized but unissued shares to acquire control of two companies, viz., Southply, Incorporated and United States Concrete Pipe Company of Florida. Apart from increasing the number of shares outstanding, these acquisitions could make Piper less attractive to Chris-Craft since the Pipe Company was not in the recreational field and ownership of Southply, a speedboat manufacturer, might bring Chris-Craft into conflict with antitrust law. However, Piper rescinded both of these acquisitions within a short time. Piper had failed to comply with its listing agreement with the New York Stock Exchange by issuing such a block of shares before seeking the approval thereof of its stockholders. This omission led the Exchange to refuse the listing of the newly issued shares, to suspend trading in all Piper shares on the Exchange and to initiate delisting proceedings.

Following the rescission of both of these acquisitions, the Piper family revived negotiations with Bangor Punta, begun early in January, toward securing a defensive merger between Piper and Bangor Punta.

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[2] Part of the agreement, not mentioned in the announcement, was an option in Grumman to "put" the shares back to Piper after six months at Grumman's cost plus interest. Piper insists that the "put" was part of an overall understanding that the proposed sale was a step in a possible Grumman-Piper merger, failing which Grumman might not be interested in a holding of Piper stock. The "put" was described in Piper's application to list the additional shares on the New York Stock Exchange.

The discussions were fruitful. The Piper family agreed to exchange its 501,090 shares for a package of Bangor Punta securities and Bangor Punta agreed to use its best efforts to acquire a majority of the outstanding Piper shares. Pursuant thereto, on May 8, 1969, Bangor Punta and Piper issued a release which made the usual joyful announcement of a fitting marriage, stating that the Piper family would receive Bangor Punta securities for their Piper shares and containing the following potent message:

> Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta Securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share.[3]

Chris-Craft has attacked this release and has attacked also the registration statement referred to in the release. We deal later with those issues.

Bangor Punta entered the battle with several considerable advantages. It was sponsored by the management of Piper, it could look forward to the Piper family block[4] and, significantly, it alluded to a value figure of $80, exceeding

[3] Shortly after this release was issued, the Commission, deeming the release to be a gun-jumping offer by Bangor Punta, sought in the U. S. District Court for the District of Columbia an injunction to prohibit further similar releases before effectiveness of the Bangor Punta registration statement. Bangor Punta and Piper, without admitting any of the allegations, consented to the issuance of an injunction.

[4] One of the issues raised by Chris-Craft respecting Bangor Punta's acquisition of the Piper block relates to a guarantee by Bangor Punta to the Piper family that they would receive $80 for their stock if Bangor Punta acquired control. All parties agree that no similar guarantee inhered in the $80 value statement contained in the May 8 release.



Chris-Craft's cash tender offer and the values to be imputed to the Chris-Craft package. This was a serious blow to Chris-Craft. Accordingly, one day after Chris-Craft's exchange offer became effective, it added $10 to its package. Chris-Craft continued to acquire Piper stock until August, 1969, when it virtually ceased buying the stock. Through its succeeding exchange offers and together with its open market purchases, Chris-Craft had by then obtained 697,495 Piper shares, about 42%, while Bangor Punta, by early September, 1969, ended with slightly more than 50%. The contest for control was over except for the litigations questioning the actions of the parties along the way which has embroiled them in claims and counter-claims.

*Chris-Craft's Status Under the Securities Exchange Act*

Both sides have argued strenuously the question of Chris-Craft's standing to bring this action. Chris-Craft relies heavily on the language of the Court of Appeals in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), as precedent affording it status. Defendants rely on *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952) and related cases for the proposition that Chris-Craft has no right to sue.

Chris-Craft's claims fall into several categories, each requiring separate consideration of the question of standing to sue.

(a) Chris-Craft made purchases of Piper stock and claims to have acted on statements of Piper about its important product lines. Even though its purchases were not from Piper, it has standing to assert such claims. *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 968 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

(b) Chris-Craft seeks damages from Bangor Punta claimed to have resulted from the purchase by the latter of three blocks of Piper stock, totalling 120,200 shares in May, 1969, during the pendency of their competing offers to Piper holders, in violation of SEC Rule 10b-6. Chris-Craft claims that these purchases enabled Bangor Punta to obtain majority ownership of Piper. It is held that Chris-Craft has standing to attempt to establish such a claim.

(c) Chris-Craft claims damages from the defendants on the charges that, during the pendency of Chris-Craft's attempt to take over Piper, Piper and Bangor Punta issued improper press releases and Bangor Punta filed a registration statement with material omissions and misstatements. Chris-Craft, which neither bought nor sold on the basis of the releases or registration, premises its standing to sue thereon on two grounds; one is an exception to the *Birnbaum* doctrine repeated in, *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); the other is predicated on a recent amendment to the Securities Exchange Act of 1934.

The first theory is that Chris-Craft is in the position of a "forced seller" as a result of Bangor Punta's acquisition of a majority of Piper's stock. Chris-Craft emphasizes the decision of the Court of Appeals in *Crane Company* v. *Westinghouse Air Brake Company*, 419 F.2d 787, 797-98 (1969), *cert. denied*, 400 U.S. 822 (1970).

In *Crane* the Court of Appeals distinguished *Iroquois Industries, Inc. supra*, (decided by the Court of Appeals five weeks prior to *Crane*—with rehearing denied by the Court of Appeals on the very day on which the *Crane* opinion was issued) by pointing out that plaintiff in *Iroquois* (a disappointed contender for control) was neither a buyer nor a seller, whereas in *Crane*, the disappointed



contender was deemed a "forced seller". Chris-Craft claims to be a locked-in buyer which could sell only at a substantial loss, and that it could not under state law (Pennsylvania) resist a merger, should Bangor Punta, as majority holder, elect to effect one.

While the "forced sale" argument here rests on quite different grounds from those expressed by the Court of Appeals in *Crane*, Chris-Craft might be within the realm of reason in asserting itself to be a forced seller, should a merger of Piper be effected under Bangor Punta's control. However, no such merger has been proposed and the "forced seller" basis for standing to sue is in this case as compared with *Crane* of highly dubious validity.[5]

The second theory on which Chris-Craft relies for standing to assert the matters relating to the press releases and registration statement is that Section 14(e) of the Securities Exchange Act affords it a right of action. Section 14(e), 15 U.S.C. §78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request

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[5] Crane Co.'s position as a forced seller was deemed to result from the fact that its target, by merging with a product competitor of Crane (Standard) made Crane an involuntary holder in its competitor and vulnerable to antitrust action. Crane thereupon sold out virtually all of the Standard holding acquired in the merger. It may be that one need not have looked beyond the merger itself to these special facts to deem Crane a forced seller. While the exchange effected in a merger has not been traditionally deemed by SEC to be a "sale" for registration purposes, it has been deemed a "sale" for purposes of invoking anti-fraud provisions.

> or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. *The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.* (Emphasis supplied).

This section was added to the '34 Act in 1968. The last sentence was added in December, 1970 (one year following the decision of the Court of Appeals, Second Circuit, in *Crane*).

In *Crane,* the Court of Appeals commented in dictum that Section 14(e) "should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is *Crane,* in the position of a forced seller." 419 F.2d at 798-99. This comment may find support in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 940 (2d Cir. 1969), where the target of a takeover bid, as well as that corporation's shareholders, were accorded standing to sue for alleged violations of §14(e) occurring in the course of a control fight. Judge Friendly stated that the amendment which produced section 14(e), "In effect . . . applies Rule 10b-5 both to the offeror and to the opposition" and added that "except perhaps for any bearing it may have on the issue of standing, [the amendment is] only a codification of existing case law."

The conclusions herein reached as to Chris-Craft's 10b-5 claims will be dispositive of the merits of any claim based on §14(e). Under the circumstances, the Court finds it unnecessary to decide whether §14(e) may be separately invoked by one competitor for corporate control against another.



*1. Piper's shareholder letter and release of January 23, 1969.*

(a) One of the attacks on these communications centers on the utterance by the Piper management of its view that the $65 Chris-Craft offer was inadequate. While the offer was some $13 above the current market price, it was considerably less than a Piper holder, biding his time, could have received at later stages of the contest.

Chris-Craft insists that the communications could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead—it points out that

(1) Piper's own bankers had advised Piper that $65 per share was a fair price and

(2) the Grumman agreement contemplated a sale of Piper stock by Piper to Grumman at $65 per share.[6]

Any Piper shareholder with a telephone or a newspaper at hand could compare the current market for Piper shares with Chris-Craft's offer. Thus, if the Piper statement of the inadequacy of the offer were intended to refer to price only it would be more fatuous than misleading. The more rational view is that the statement referred and was or should be taken to refer to other factors—such as Piper's

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[6] We do not doubt that one of the reasons for the Grumman agreement was the effect its consummation would have on the number of shares outstanding and consequently on the number Chris-Craft would have to acquire to gain control. W. T. Piper, Jr. had no hesitancy in stating that the Grumman transaction "would give us additional shares" and that it "might make the . . . tender offer of Chris-Craft less attractive to our shareholders." A psychological effect may have been intended as well—to discourage Chris-Craft early in the game by facing it with the prospect of a heavier than anticipated commitment to the contest. As noted above, the shares were never issued.

management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control.

That Piper's management refrained in these releases from expressing fully its personal (and in all likelihood unflattering) opinions about Chris-Craft's management does not, in our opinion, fault the communications. And if the statements were intended to convey the impression that to resist Chris-Craft Piper's management would bend its efforts to procure a better alternative for Piper shareholders, the efforts were made and were, in terms of price to tendering shareholders, successful.

Chris-Craft makes the further assertion that it was itself, as a purchaser, misled by the announcement of the Grumman agreement. Chris-Craft claims that an indication that Grumman was willing to pay $65 (in the absence of disclosure of the "put"—see n. 2 supra) helped to justify its own decision to pay that much, indicated that Chris-Craft might have a willing buyer for its block, should it decide to unload, and led Chris-Craft to refrain from exercising its right to withdraw its offer if any material increase in outstanding Piper shares were proposed or made.

While the Court has no doubt that the Grumman agreement, the announcement and their timing were strategic moves, it cannot conclude that the agreement was a sham, or that the "put" provision was anything more than what Piper purports it to be—Grumman's "out" in the event that a Grumman-Piper merger did not materialize. These were all, under the circumstances, rational steps for the Piper and Grumman managements to take and the Court cannot hold that in taking its steps Piper had any special duty to warn Chris-Craft (by disclosing the "put" or otherwise) not to gather comfort from the agreement price of $65 and not to rely on Grumman as a possible dumping ground for its shares of Piper.



Chris-Craft admits that Piper described the "put" aspects of the Grumman agreement fully in its application to the New York Stock Exchange for listing of the additional shares. Chris-Craft's contention therefore that, despite its efforts to obtain a copy of the Grumman agreement, it did not learn of it until April, 1969 when two Chris-Craft representatives were elected to the Board is not worthy of belief and can evoke little more than the additional response that it could have been more sedulous than it was to protect its already heavy and growing investment in Piper.

But the fatal blow to Chris-Craft's credibility on this issue is its action after April, 1969 when it claims first to have discovered the "put" provisions of the Grumman agreement. Between April 1 and August 18, Chris-Craft acquired about 150,000 additional shares of Piper. On May 16 it added $10 to its exchange package to compete with Bangor Punta. Such behavior with knowledge of the facts is inconsistent with a claim that knowledge would have caused Chris-Craft to change its course. Plaintiff's reference to *SEC* v. *Great American Industries*, 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (nondisclosure of finders' fees) is, under the circumstances, beside the mark.

(b) Chris-Craft has further criticized the communications for saying that Piper was in a growth industry and expected "to participate fully in this growth". The basis of its attack is in product problems faced by Piper in connection with a model then in development (Pocono) and one already on the market (Twin Comanche). These are discussed at greater length, *infra*. Here it is sufficient to point out that inherent in Chris-Craft's claim are the assumptions (1), that these problems would effectively prevent Piper from participating in the industry's growth—which it has not proved and (2), that this on-the-run re-

sponse of Piper's management to Chris-Craft's foray into the Piper stock is to be tested by the standards applicable to a registration statement—a view which this Court rejects.

Chris-Craft's contentions as to the January Piper communications and the Grumman agreement must be and are rejected as unfounded.

*2. The May 8th Release*

This release is one of Chris-Craft's principal targets. Chris-Craft asserts that the release was in violation of the registration and prospectus provisions of the Securities Act of 1933, especially § *5(c)* (15 U.S.C. § 77e(c)). This contention has the support of the SEC, which, in May, 1969, brought an action in the District of Columbia to restrain further releases of a similar character, with Bangor Punta consenting to a decree, and it has the support of the Court of Appeals of this Circuit, which held, in *Chris-Craft Industries, Inc.* v. *Bangor Punta Corporation,* 426 F.2d 569, 573-76 (2d Cir. 1970) that the release violated the registration requirements. The Court of Appeals nonetheless sustained the District Court's refusal to issue a preliminary injunction to prevent Bangor Punta from gaining and exercising control of Piper, but remanded the case for further proceedings.[7]

While the law of these injunction cases, as contended by Chris-Craft, may be that the May 8th release violated Sec-

[7] Four opinions were written. Judge Waterman wrote the majority opinion for a full court (with Judge Friendly not participating). Judge Moore uttered strong doubts as to the majority's rejection of Bangor Punta's claim that the release was in conformity with SEC Rule 135, 17 C.F.R. § 230.135. Judge Anderson, who concurred in the legal conclusions of the majority, expressed separate views as to the materiality of the $80 statement. Judge Lumbard (then Chief Judge) could find no substance in Chris-Craft's legal claims as to Section 5(c), 15 U.S.C. § 77e(c), or Rule 10b-6, 17 C.F.R. § 240.10b-6 (to be discussed).



tion 5(c) of the Securities Act, that by no means disposes of the issue in the damage suit here being adjudicated.[8] Since Chris-Craft was not a purchaser of Bangor Punta stock it has no standing to invoke the provisions of Section 11 or 12(2) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l(2)) (material misstatements in or omissions from registration statements) or of Section 12(1) of the Act (15 U.S.C. § 77l(1)) (sales in violation of the registration requirements). The plaintiff's claim, to be actionable in this damage suit, must rest on other grounds.

As the Court of Appeals indicated, embodying the substance of the May 8 release in a full registration statement might have served to dispel possible erroneous interpretations of the release by those to whom it was addressed and

> "... would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended." *Chris-Craft* v. *Bangor Punta,* per Waterman, J., 426 F.2d at 575.

[8] The issue in the "case" before the Second Circuit was whether an injunction should issue. The denial of an injunction was affirmed and it was left to the Trial Court to determine what, if any, consequences were to flow on remand from the views of the Court of Appeals as to the application of Section 5(c), 15 U.S.C. § 77e(c), of the Securities Act and Commission Rule 10b-6, 17 C.F.R. § 240.10b-6 under the Securities Exchange Act. The case before the District of Columbia Court was also one involving injunction, not damages, and Bangor Punta's consent to an order may well have been grounded on considerations other than the merits of the SEC's action. The "case" tried before this Court is radically different from the "case" considered on the appeal to the Second Circuit. Sometime after the decision on appeal, at a pre-trial hearing, Chris-Craft elected to abandon and announced the withdrawal of its claim for injunctive relief and stated that the plaintiff's sole claim was one for damages and accordingly that is the claim which is to be decided here.

It must be borne in mind that this is not an action by a former Piper shareholder who exchanged his stock for Bangor Punta securities, nor is it a suit for an injunction and equitable relief.

This is a case by a disappointed contender for control attempting to invoke a registration requirement designed for the protection of the public in order to obtain damages for itself because of a premature offer to sell. Yet Chris-Craft does not point to any damage to Piper holders occasioned by the premature release, nor has it adduced any evidence that the release was anything but true when taken in its own terms—as a statement that it was Bangor Punta's intention to offer a package which would be worth $80 in First Boston's judgment.[9] Even if the release were taken as a representation of future values, it should be noted that actual values reached by the Bangor Punta package were so close to $80 as to render any variance *de minimis*.[10]

Any claim of Chris-Craft that the violation of Section 5 *per se* induced enough Piper holders to accept Bangor Punta's offer to tip the balance of control in Bangor Punta's favor must be supported with proof that this resulted from the absence of the information which a full registration statement and prospectus would have contained. Chris-Craft has made no such showing. Moreover, a showing that the acquisition of a particular block was enough to give Bangor Punta control would not by itself constitute proof that control would have fallen to Chris-Craft if Bangor Punta had failed to acquire that particular block. While the delay which might have occurred in the processing of a full registration statement by Bangor Punta might have given Chris-Craft extra time to forage about for Piper stock while Bangor Punta was preparing its statement for filing, Chris-Craft has adduced no proof that it was disadvantaged in this regard. *Cf.* 426 F.2d at 573.[11]

Chris-Craft did respond to the May 8 release by raising its bid. Its cost of acquiring Piper stock was thereby directly and immediately increased. But everything in this record is consistent with the conclusion that Chris-Craft would have done the same thing even if the substance of the release had been embodied in a fully cleared prospectus. There is nothing in this record which shows that the release was, in intent or effect, false or misleading as to Chris-Craft or the public.[12] Any increase in Chris-Craft's costs occasioned by the release was occasioned by its substance and not by the absence of a registration statement.

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[9] The Court is familiar with instances in which exchange offers contemplate, and describe, formulas guaranteeing a market value for the securities to be given in exchange for the target company's stock. Such descriptions are common and leave no doubt as to their intentions. The language of the May 8 release could not be confused by reasonable men (much less professionals of the purported stature of Chris-Craft's witness on the point) with offers intending or implying guarantees of market value.

[10] Based on various alternative methods of valuing the Bangor Punta package in the week following July 23, five days after effectiveness of the Bangor Punta exchange offer, the Bangor Punta package had a high market value of $79.93 and a low of $73.37. By contrast, using the same bases, Chris-Craft's package in the period had a high of $75.50 and a low of $63.25.

[11] "We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage."

[12] It must be borne in mind that the fact that a statement violates Section 5 of the Securities Act, 15 U.S.C. § 77e, does not necessarily connote that the statement is either false or otherwise misleading within the meaning of Rule 10b-5 upon which Chris-Craft relies. A thoroughly adequate disclosure—even a full registration statement—used in offers to sell before a required filing violates Section 5.

Chris-Craft fully understood what the release was meant to convey. Chris-Craft is not entitled in this suit to the recovery of damages under Rule 10b-5 for the violation of Section 5.

*3. The Bangor Punta Registration Statement*[13]

Chris-Craft complains of the Bangor Punta registration statement covering the package of securities it was offering in exchange for Piper stock, alleging that material falsity in the statement was part of the scheme to divert Piper holders away from Chris-Craft.

The principal attack is on the figure at which Bangor Punta carried its holdings (almost 100%) of the Bangor and Aroostook Railroad (BAR). Bangor Punta carried the BAR stock on its books at $18.4 million—an unconventional figure in terms of transactional accounting, and one with a checkered history.

Historical cost of the BAR stock, less depreciation and other accounting adjustments, was $29.8 million. In 1965, in view of a then possible sale of BAR, Bangor Punta wrote the asset down to some $8 million. That sale did not materialize and the carrying figure was again revised (this time upward) to reflect an $18.4 million valuation of the BAR investment by investment bankers. The book increase resulting from this revaluation was credited directly to earned surplus (bypassing the income accounts).

There is no dispute as to this series of adjustments. The $18.4 million carrying figure is, however, attacked as materially misleading in view of a sale of Bangor Punta's

[13] A fuller discussion of this issue is contained in this Court's opinion in *SEC* v. *Bangor Punta, et al.*, 331 F. Supp. 1154 (S.D. N.Y. 1971) (Pollock, *J.*). Only high-light facts are here discussed.



interest in BAR, at $5 million (and additional contingent consideration) which did occur in October, 1969, a few months following effectiveness of Bangor Punta's registration of its Piper exchange package.

Chris-Craft asserts that the agreement to sell the road at that figure existed earlier and should have been reflected in Bangor Punta's registration statement. The charge is that Bangor Punta postponed formal contract and closing to avoid having to reflect in its registration statement a book loss of $13 million on the sale.

In *SEC* v. *Bangor Punta*, n. 13 *supra*, this Court concluded that there was no substance in similar allegations by the SEC regarding the BAR matter. We held, however, that the registration statement was unintentionally in error in failing to disclose the circumstances which rendered Bangor Punta's carrying figure of the BAR holding obsolete and misleading absent such disclosure. An injunction against further violation of the securities laws was sought by SEC in that case but was denied. However, the Court ordered that shareholders who accepted the Bangor Punta exchange offer be given an opportunity to rescind their exchange should they elect to do so because of the registration error. This result expressed the principle that a registration statement with a misleading effect should be corrected for those to whom it related, whether or not the error was made with intent to mislead.

But that result does not conclude the issue here. This is not a suit by a Piper shareholder claiming to have been damaged by the error in respect to the BAR or any other matter pertaining to the registration. Chris-Craft did not rely on or purchase under the registration statement filed in connection with the exchange of Piper shares for Bangor Punta securities and, for the following reasons, we cannot

conclude that plaintiff merits, under the circumstances, any recovery under federal law on this branch of the case.

Chris-Craft's complaint with respect to the Bangor-Punta statement is not based on the provisions of the Securities Act expressly designed for such complaints. Secs. 11 and 12, 15 U.S.C. §§ 77k and 77*l*. It does invoke the broad provisions of Section 10, 15 U.S.C. § 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5, under the Exchange Act, and of Section 14(e), 15 U.S.C. § 78(n)(e), under that Act. It thus presents us with the question whether and to what extent these general provisions can fairly be construed to override the more specific ones prescribed to implement private actions in complaint of registration statements.

We have no doubt that a violation of the registration requirements can, also, be a violation of Section 10b(5) and 14(e) of the Securities Exchange Act. But the mere fact of a violation of registration requirements under the '33 Act does not automatically trigger Section 10b and Rule 10b-5. The reasons and basis for invoking the '34 Act provisions must exist independently. The essentials are material deception, some form of scienter and a causal relation between the deficiency and the harm complained of. These essential elements have not been established in this case. At a minimum, neither a form of scienter nor proof of causal effect was established here.

Chris-Craft does not, in this Court's view, stand in the position of the plaintiff in *Mills* v. *Electric Autolite*, 396 U.S. 375 (1970) as being entitled to ask the Court to disregard traditional requirements that a causal connection be shown between the claimed violation and the injury. The attack in *Mills* was on a proxy statement which did not adequately disclose the true interest of directors who recommended a merger. This omission directly affected the shareholders on whose behalf the suit in *Mills* was



brought.[14] It was in that particular context that the Supreme Court deemed sufficient a set of facts under which shareholders *could* be misled.[15] This does not aid Chris-Craft as it is seeking to recover because of the effect which a misstatement allegedly had on third parties.

A Piper holder's decision to tender to Bangor Punta and Chris-Craft's failure to acquire the shares of such a holder cannot be held to be so clearly tied to the registration statement as to obviate the need for proof which would, at least, indicate a causal connection producing damage to Chris-Craft.

Chris-Craft was indeed a Piper shareholder. But it did not exchange any of its Piper shares for Bangor Punta. Its complaint is solely that of a defeated contender for control and it has asked this Court for a money award in the absence of evidence establishing a reasonable probability that its defeat and damage were connected with the claimed violations. There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. In a damage suit, as distinct from one for equitable relief, such proof is essential to sustain a 10b-5 claim. In effect, Chris-Craft seeks the windfall of a punitive award against Bangor Punta by assuming the role of defender of the public

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[14] See *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964), ("We consider only . . . whether § 27 of the Act authorizes a federal cause of action . . . to a *corporate stockholder* [arising from use of a misleading proxy statement]" (emphasis added)).

[15] "Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Mills*, 396 U.S. at 385.

interest in the purity of the registration process. This role has already been assumed by the Commission and we could well expect it to be assumed by exchanging Piper holders if there were material harm to them.

Both *Crane* and *Mills, supra*, indicate that in a proper case "tendency to result" may be as good coin as "result" and "could" be as good as "did" in establishing a right of action. The evidence does not support a notion that the Bangor Punta registration statement presents such a case. Despite the language of *Crane*, the facts indicated that blatant manipulation (overt buying and covert selling) was used to "paint the tape" as Court of Appeals Judge Smith said. By this means a competitor for control (Standard) was able, on the crucial days of Crane's tender offer, to raise the price of target company (Westinghouse Air Brake) stock to a level which assured defeat of Crane's campaign. The character of the violation and the clear causal nexus were crucial to the *Crane* result. These characteristics have not been demonstrated here. In *Mills*, as pointed out *supra*, the suit was on behalf of and for protection of the class to which the proxy material was addressed and for which the proxy rules were designed.

Granting to Chris-Craft full standing to raise the issue of falsity in the Bangor Punta registration statement would, in this Court's view, permit it to do no more than it has done here—attempt to show what it has not been able to show, that as a matter of substance the claimed violations entitled it to money damages.

Nor does Section 14(e) in any way alter the result on the merits. Accepting, on its face, the dictum of the Court of Appeals in *Crane* that Section 14(e) "should serve to resolve any doubts about standing in the tender offer case, even where an offeror is not, as is *Crane*, in the position of a forced seller", 419 F.2d at 798, leaves open the questions of how the substantive standards of Section 14(e) are to be applied and what levels of proof are required to evoke their application.



Section 14(e) virtually tracks the language of Rule 10b-5, with certain notable exceptions, and our 10b-5 conclusions are dispositive of the issues as raised under Section 14(e). The differences in language are significant. Section 14(e) refers to "fraudulent or manipulative acts or practices" whereas Rule 10b-5 makes unlawful "any act, practice or course of business which operates *or would operate* as a fraud or deceit on any person" Rule 10b-5(c) (italics added), and contains a prohibition against employment of "any device, scheme or artifice to defraud", Rule 10b-5(a) (language not present in Section 14(e)). In the context of the facts of this case, Section 14(e) adds no weight to contentions of Chris-Craft that it need not establish a nexus between the violations it charges and the damages it claims to have suffered.

In addition to the charge of deficiency in the registration statement based on the BAR carrying figure, Chris-Craft has alleged the failure of the statement to reflect the terms of outstanding institutional loans, the relatively favorable treatment to members of the Piper family in the exchange (see n. 4 *supra*) and a guaranty to a group of Piper holders (the "Bolles" group), ostensibly for tax purposes, of a resale price for the Bangor Punta package of not less than 32½% of the value thereof at the close of the exchange. The Bangor Punta prospectus, while it did not pinpoint each of the alleged deficiencies made it more than amply clear that special treatment was being afforded by Bangor Punta to management personnel of Piper—so that the willingness of these large holders to effect the exchange for Bangor Punta may have been conditioned by their personal advantages as well as their views as to the best

interests of Piper. Thus Chris-Craft's charges, in essence that this motivation was not disclosed, resolve themselves into a dispute over adjectives. None of the registration errors, including the BAR item, went beyond mere negligent omission or misstatement of fact.

*4. Application of Rule 10b-6*

SEC Rule 10b-6 interdicts bids for or purchases of a security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution". Included in the prohibitions are bids for or purchases of "any right to purchase any such security."[16]

Bangor Punta made three block purchases of Piper shares during the pendency of its exchange offer. It purchased 78,600 shares from Fund of Funds Proprietary Fund, Ltd. (Proprietary) and two blocks, totalling 41,600 shares, from Bay Securities Corporation and American Securities. Chris-Craft claims that all three blocks were purchased in violation of the Rule. Bangor Punta claims the benefit of an exemption from the operation of the Rule for the purchase from Proprietary. Rule 10b-6(a)(3)(2), 17 C.F.R. 240.10b-6(a)(3)(ii)(1971).

The application of the prohibitory provisions of Rule 10b-6 is not before us for *de novo* decision. The Court of Appeals has ruled that Bangor Punta's purchases violated the first sentence of the Rule. However, it left open two vital questions to be decided on the remand. One is whether the exemption contained in paragraph (a)(3)(2) of Rule 10b-6 is applicable. The other is the determination of what remedy is appropriate.

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[16] There is no dispute that, under the circumstances of this case, Piper stock was, within the meaning of the Rules, a "right to purchase" Bangor Punta stock.



Paragraph (a)(3)(2) of Rule 10b-6 exempts

> unsolicited privately negotiated purchases, each involving a substantial amount of such security [in distribution], effected neither on a securities exchange nor from or through a broker or dealer.

As stated above, Bangor Punta claims an exemption from Rule 10b-6 only for the Proprietary block. A literal reading of the exemption requires a finding that the Proprietary purchase, like the others, was not exempted.

Proprietary's functions appear to have been solely to execute transactions for its associated mutual funds.

The Proprietary purchase followed a visit by a Bangor Punta executive with officials of Proprietary in Nassau, and it appears further that Bangor Punta made a payment of 75¢ per share to London & Dominion Trust Company, Ltd., which acted as nominee for Proprietary's Piper holding.[17] Absent any other cogent explanation for the visit the facts seem to point fairly at a solicitation of the purchase from Proprietary as the reason for the visit. It is so found.

The Court has searched for substance in the 10b-6 contention behind the technical violation, in the context of a claim for damages rather than in a suit for injunction.[18]

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[17] Chris-Craft claims that this was a commission payment. Bangor Punta asserts that it was a fee. Resolution of this issue is unnecessary. Commission payments are not prohibited by the exemption (except by implication from the exclusion of purchases through a broker). The status of the seller as a broker-dealer as well as the "solicitation" involved in the Nassau visit are in themselves enough to deprive the transaction of an exemption under a literal reading of paragraph (a)(3)(2) of Rule 10b-6.

[18] It has been suggested in some quarters that Rule 10b-6 is of doubtful application in cases such as the one at bar. The stock bought by Bangor Punta was Piper stock, not its own. Since it was

This search has not revealed such substance as to merit serious consideration of the charge as a basis for money damages.

Despite the failure of Bangor Punta's acts to match the literal prescriptions of the exemption, this Court cannot conclude that Chris-Craft has established any right to recovery under Rule 10b-6. Even granting that the block purchases resulted arithmetically in Bangor Punta's achievement of control, there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control. Thus the record will not support a contention that Bangor Punta should, by reason of violation of Rule 10b-6, compensate Chris-Craft for the latter's failure to gain control of Piper.

1. Chris-Craft was not misled by the purchases of Piper stock effected by Bangor Punta during the "distribution" of Bangor Punta's stock in the Piper exchange. The primary purpose of Rule 10b-6 is to prevent bids or purchases

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embarked on a program of purchasing Piper and its self-interest would cause it to seek to do so as economically as possible, it would have no reason to stimulate demand by others for or inflate the price of Piper stock. Its motivation would, therefore, be to adhere to rather than violate the purpose of Rule 10b-6. While Piper stock and not Bangor Punta stock was being purchased, the purchases fell within the Rule because Piper stock was exchangeable for the stock being distributed—i.e., Bangor Punta stock. Any rise in Piper would in effect depress the value of Bangor Punta securities offered in exchange. But even if the price of Bangor Punta's securities were somehow being stimulated that rise would be of no avail to Bangor Punta in the exchange. For market arbitrage would almost immediately raise the price of Piper to align it with the rising price of the Bangor Punta securities offered in exchange.

These considerations, however, are foreclosed to this Court by the Court of Appeals which has found Rule 10b-6 to be violated and which remanded solely to have determined the question of the exemption and the appropriate remedy, if any, in the context of a suit demanding an injunction (which this no longer is).



by a distributor of securities which have a stimulating effect on the market. The Rule thus seeks to protect a potential buyer from paying a price for the security in distribution other than that set by untrammeled market demand or from being misled into believing that the market demand is wholly that of independent purchases. See *SEC* v. *Scott Taylor and Co.*, 183 F. Supp. 904, 907 (S.D. N.Y. 1959). Chris-Craft was not in that position. It knew that significant large blocks of Piper stock were in existence, that Bangor Punta was as anxious as Chris-Craft to acquire those blocks and that Bangor Punta's acquisitions (like its own) would place such blocks at a premium.

2. Was the public misled by Bangor Punta's acts? Here too there is not a scintilla of evidence that any Piper holder was misled. And the absence of such evidence may be explained by the fact that the acts of Bangor Punta here in question, while they did not comply with the literal terms of the exemption contained in paragraph (a)(3)(2) of Rule 10b-6, were nevertheless well within the spirit of that exemption. This is a root factor in determining whether the 10b-6 charge has real substance. For the exemption from the prohibitions of the Rule, in a vital sense, defines the basic purposes of the Rule by delineating the kinds of transactions which have little, if any, tendency to radiate a stimulating effect into the general market.

If we lay the transactions complained of against the intent behind the words of the exemption provisions it becomes clear that the block purchases fell within the intent of the exemption, if not within its words.

(i). Paragraph (a)(3)(2) requires that purchases, to be exempt, must be substantial. The obvious reason for this provision is to prevent fragmenting purchases in order to create the appearance of a spread of demand. There is

no dispute that Bangor Punta's block purchases were of a substantial nature. There is no evidence that Bangor Punta fragmented its purchases or otherwise acted to produce or heighten a stimulating effect on the market.

(ii). A distributor's solicitation of purchases, while distribution is in process, may have the same effect as purchases by the distributor. It may create an appearance of demand which is artificial in fact. However, while we have concluded that the visit of a Bangor Punta executive to Nassau was to solicit a sale to Bangor Punta by Proprietary, it was not solicitation calculated to have the effect condemned by the Rule. There is no evidence that it was broadcast, or that it was otherwise radiated into the general market where it might have had the prohibited stimulative effect. And, even if the payment of 75¢ per share to Proprietary's nominee bank were deemed to be part of the inducement to acquire the block, that fact does not change the local and unpublicized character of the entire Proprietary transaction.

(iii). A purchase on an exchange cannot be exempted. The reason is obvious—and casts a consistent light on the prime purpose of the Rule; a purchase on an exchange becomes a broadcast item and consequently one of the components of the price trend of the security. The purchases complained of were not effected on an exchange.

(iv). Purchases from or through brokers or dealers cannot, technically, be exempted. This element of the exemption has the same function as the requirement that the purchase not be made on an exchange. Brokers and dealers are constantly quoting, broadcasting and varying their quotes with indications of change in supply and demand. Thus a purchase from or through a broker or dealer, even though in the over-the-counter market, may have the same tendency to affect market price. But neither Proprietary



(from which 78,600 Piper shares were purchased) nor Bay Securities Corporation (from which blocks aggregating to 21,600 Piper shares were purchased) was a broker or dealer in the conventional sense. Both were "in-house" facilities of mutual fund complexes acting for the funds they served. As such they may well have had the policy of secrecy which characterizes the operations of many funds during the period of acquisition or disposition of blocks. It is a common mutual fund practice to report even significant trades under a "miscellaneous" and unidentified rubric until the intended amount to be purchased or sold has been reached—and then often only in periodic reports after the fact and merely as a change buried in a list of one hundred or more portfolio holdings.[19]

5. *Piper Product Problems*

We deal here with the complaint of Chris-Craft that, as a purchaser of Piper securities, it relied to its detriment on statements of Piper rendered materially false and misleading because of certain vital omissions.

Piper, in its 1967 and 1968 annual reports and in certain other public statements, had issued optimistic reports about a new development (the Pocono plane) and about a principal product (the Twin Comanche) the latter accounting for a significant portion of its revenues. In fact, both of these products were facing serious problems. The Pocono depended for its successful development on an engine to be created by Avco Lycoming. Lycoming, despite its attempts to create one with the required horsepower, failed

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[19] Some time after the occurrence of the events litigated in this case the SEC adopted Rule 10b-13. That Rule interdicts (with exceptions not here pertinent) any purchase by a tender or exchange offeror otherwise than through the tender or exchange. It is a *post hoc* regulation which cannot be applied here.

to do so. The Pocono project, whose continuation or abandonment was a subject of dispute within Piper, was in fact abandoned by Bangor Punta shortly after it acquired control.

The Twin Comanche, while it was extensively sold and used, had operating characteristics which required especial skill and alertness of the pilot for safe handling. At some time or other various governmental agencies had noted and commented on these characteristics and between its inception in 1962 and May of 1969 the Twin Comanche had been involved in 62 fatal accidents resulting in over 130 deaths. Of the 62 accidents, 29 were the result of stall-spins —a propensity of the plane apparent from prior tests.

Chris-Craft complains of a 1967 annual report which described the Pocono as Piper's "major advanced research project", that indicated that the plane was undergoing flight tests, that deliveries of the plane were expected to begin in 1970 and that plans were in progress to build a plant in Florida for manufacture of the product.

The specific criticism levelled against this report by Chris-Craft is as follows:

> Nowhere was the public cautioned that the plane being tested had only an interim engine, that Avco Lycoming had not yet delivered or manufactured the engine required for the plane, and that the success of the venture hinged entirely on the ability of Lycoming to produce an engine powerful enough for the Pocono to meet FAA certification requirements or that it had encountered difficulties and delays in doing so.

Piper, on its side, points to statements in its reports and in trade articles which it claims put the Pocono project in its proper perspective as an "experimental project" "being



tested". It asserts that at no time until September, 1969, was there a discussion of abandoning the project, let alone a decision to do so. Piper points out also that as late as August, 1969, Lycoming said that it could produce, promptly, the required engine for the Pocono. And the testimony of Bangor Punta's chief executive indicates that cost (as well as engineering) was a signficant factor in his decision to abandon the project. There is every indication that if the Pipers had remained in control, the Pocono would not have been abandoned.

We cannot find that Piper's statements, even when viewed in the light of subsequent difficulties and eventual abandonment of the Pocono project, could be deemed materially false as of the time they were made. Chris-Craft denies that it is exercising "hindsight". However, the problems it points to, viewed as of the time of Piper's statements, seem little different from those attending many eventually successful product developments. While it is not easy, in considering the Twin Comanche, to avoid interlacing into the issues of this case the general public policy of air safety, that must, in this Court's view, be done. Chris-Craft has not shown that adjusting the Twin Comanche would be so costly or that limiting the plane to use by experienced pilots would so seriously damage Piper's future as to require it to damage itself by the disclosures claimed necessary to avoid the charge of fraud.

The evidence is convincing that Chris-Craft's original decision to acquire Piper was made without knowledge of the Pocono and Twin Comanche problems—and avowedly with knowledge of little more than what was carried in standard reference sources available in brokerage offices. Despite the fact that by April, 1969 Chris-Craft had two representatives on the board of Piper it did not, it claims, learn of the Pocono and Twin Comanche problems until

September of 1969. By then, its purchasing was over and Bangor Punta was in control.

However, the record affords considerable support for the conclusion that Chris-Craft went into its stock purchasing with no concern about these product problems. The record fairly requires the inference that incidents involving the Twin Comanche and official reports on its operating characteristics could have been timely learned and timely appraised by anyone wishing and able to commit millions to a campaign for control of Piper. The claimed lack of knowledge or notice of products problems is not credited.

Chris-Craft asserts that it relied on Piper's statements (claimed to be misleading because of omissions) respecting the Pocono and Twin Comanche is making its heavy investment in Piper. However, Chris-Craft has not convinced the Court that these products, or what Piper said of them, were considered or material in Chris-Craft's investment decision. To demonstrate the materiality of the Pocono development, Chris-Craft asserts:

> Technology Fund, a mutual fund with no greater expertise about the aircraft industry than Chris-Craft, was Piper's largest record shareholder outside of the Piper family as of January 1969. . . . A Technology Fund research report dated November 19, 1968—more than a month before Chris-Craft's first purchase of Piper—stated, in part:
>
> At 52 Piper is adequately priced and little appreciation is expected until the anticipated extremely favorable third quarter. Quite possibly Piper could go to 18 times 1969 earnings, which produces a price of 63. However, at that level, it would be fully priced and sale would be in order except that before sale, the Pocono's outlook should be reviewed, as it really dominates Piper's future.



The demonstration shows more than it was intended to. As matters stood when the Technology Fund report was written, the Fund was not misled by Piper's reports. It appraised Piper as "adequately priced" at 52. A price of 63 would justify a sale unless a later review of the Pocono development might indicate otherwise.

Chris-Craft, within weeks after this report by the experts of the Fund, paid the Fund more than $6,500,000 to acquire some 101,000 Piper shares held by the Fund. With no more (and perhaps less) information *at the time* than was then available to the Fund's experts it over-anticipated the Fund's most bullish possibility of market value ($63) based on earnings reports and bought deep into the future of Piper and, it claims, Pocono. The "materiality" of the Pocono development is amply demonstrated by this Fund report, but, significantly, materiality as a possibility to be closely watched, not one to be blindly bought. Chris-Craft did not rely on Piper's statements in this regard.

In balancing equities in suit by an ordinary investor this Court might weigh differently the competing duties of Piper's management: on the one hand, to avoid damaging the company by airing internal problems (which with respect to Pocono did not at the time foreshadow the ultimate abandonment of the project and, with respect to Twin Comanche, were not as irremediable as Chris-Craft wishes us to believe) and on the other hand, to avoid a misleading effect in its published statements. But Chris-Craft, under the circumstances of this case, does not merit a weighing in its favor of so delicate a set of duties. In effect, Chris-Craft's management is attempting on this issue to enlist the Court's aid in passing over to others the burden of a purported harm to Chris-Craft's shareholders which Chris-Craft's management could well have avoided by reasonable inquiry. The credible evidence adduced in Chris-Craft's favor does not warrant such a result.

*The Claim against First Boston*

First Boston and Paul L. Miller and Nicholas H. Bayard of First Boston (the "First Boston defendants") were joined as parties defendant herein. On the basis of the record, the Court cannot find that they committed, or engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper.

Indeed, were the record to support Chris-Craft's claims with respect to Piper and Bangor Punta (which it does not) the Court would be hard put to find any basis for extending liability to the First Boston defendants.

First Boston, in its capacity as an investment banker, rendered a variety of professional services to Piper Aircraft Corporation, Bangor Punta and members of the Piper family. In each case, substantive decision making power rested with and was exercised by these clients and not First Boston. First Boston was not responsible for the Piper letter to shareholders dated January 27, 1969. There is no evidence that it did more than contribute to the letter a suggestion within its area of expertise (investment prospects in the light aircraft industries generally), of which plaintiff does not complain.

The suggestions to Piper made by the First Boston defendants in respect to: the cash tender offer by Chris-Craft, the Grumman agreement, the press release concerning Grumman, the U.S. Concrete and Southply transactions, the May 8, 1969 agreement between Bangor Punta and the Piper family, the May 8, 1969 press release in connection therewith, the purchases by Bangor Punta of large blocks of Piper and the prospectuses on the Piper exchange offer, were a legitimate exercise of and limited to professional advice within the area of expertise of First Boston.





The activity of First Boston in the course of its professional relations with Piper, the Piper family and Bangor Punta does not render it responsible or liable for the actions of its clients. The record compels the conclusion that the First Boston defendants acted solely in the furtherance of what they believed in good faith to be the legitimate interests of their clients.

*The Relief Requested*

The Court of Appeals, with all Judges concurring, affirmed Judge Tenney's denial of a preliminary injunction and the case was remanded to the District Court for further proceedings not inconsistent with the majority's opinion. However, at a pre-trial conference, the plaintiff announced its election on the record to have its case considered as only a straight non-jury damage case rather than an equitable suit for injunction. No such case had been tendered to the Court of Appeals for consideration and the merit of Chris-Craft's suit in support of a damage claim was not before the Court of Appeals.

Chris-Craft acknowledges that its original attempt to have Bangor Punta divested of its majority control was a quest beset with inherent practical difficulty[20] and it gives this as the reason for now seeking damages only. In view of the conclusions reached by the Court on the issues raised by Chris-Craft, it is not necessary to pass on Chris-Craft's theory of computing the damages. However, an analysis of the damage issue here raised will illustrate the anomalous consequences which may flow from according status to sue to disappointed contenders for control,

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[20] Among other things, Chris-Craft asserts that changes effected in Piper under Bangor Punta control render Piper a different company from that into which Chris-Craft bought.

even in cases with more substance and merit than are present in the case at bar.

Chris-Craft evaluates its damages in terms of the appraisal value of its Piper stock in the light of the ability of Bangor Punta to compel a merger at any time. Recognizing the wide disparity of opinion in respect to such value on the part of "experts", Chris-Craft suggests the possible use of the procedure used elsewhere, [21] permitting an aggrieved plaintiff to tender its shares to defendant at cost.

The proximate victims of virtually all the alleged violations of which Chris-Craft complains are one-time Piper stockholders who now hold Bangor Punta stock. These are the very people against whom Chris-Craft wishes us (by a judgment against their company) to assess many millions of dollars of damages in the form of a bail-out of Chris-Craft from its misadventure in Piper.

Were every allegation of Chris-Craft supported by the record, neither reason nor justice would permit such a result. Insofar as the Piper corporation is concerned, the results of assessing damages against it would be equally anomalous. It was the prize in the battle, not a contender. Its equity is held by three distinct groups: Bangor Punta, Chris-Craft, and a small public minority which did not tender shares in the various exchanges proffered. We have already pointed to the reasons for excluding Bangor Punta from the pale of liability. Chris-Craft, of course, would be bailed out if its theory of damages were accepted. This leaves the non-exchanging Piper holders. This is the category of holders intended to be protected. There is no stretch of reason or justice which could conceivably draw

[21] *Gottlieb* v. *Sandia Amer. Corp.*, 304 F. Supp. 980 (E.D. Pa. 1969).



them indirectly into the circle of liability. See, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, at 867 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), *sub nom.*, *Coates* v. *SEC*, *Kline* v. *SEC*.

However, even properly chosen defendants must be shown to be more than putatively liable. That has not been done with respect to any defendant named by Chris-Craft herein.

While the details of every issue and argument in Chris-Craft's case have not been discussed herein, they have been considered and have not been found to warrant a judgment for Chris-Craft against any of the defendants.

The complaint against the corporate defendants, Bangor Punta and Piper, is dismissed and on the basis of the findings and conclusions herein expressed, the complaint is *a fortiori* dismissed as to all personal defendants.[22]

*Counterclaim of Piper Aircraft*

Piper has asserted a counterclaim against Chris-Craft charging that the latter violated Sections 13(d) and 14(e) (as well as 10b) of the Exchange Act.[23] This counterclaim repeats virtually all of the contentions made by the plaintiff in *Bangor Punta* v. *Chris-Craft*, S.D.N.Y. 69 Civ. 2354, which is being decided this day. Piper asks this Court to "fashion an appropriate equitable decree to deprive Chris-Craft of the benefit of its violation."

Piper was the unwilling target of Chris-Craft's bid for control of Piper. To avert what it deemed to be a raid by

[22] The agreed findings stipulated by the parties as such are found even if not fully covered herein, *non constat* many are evidentiary rather than findings of ultimate fact.

[23] § 13(d), 15 U.S.C. § 78m(d) (1971); § 14(e), 15 U.S.C. § 78n(e) (1971); § 10(b), 15 U.S.C. § 78j(b) (1971).

Chris-Craft, it invited Bangor Punta to compete with Chris-Craft. Bangor Punta acceded and (with the aid of the substantial blocks of Piper stock held by the Piper family and other significant cooperation of Piper's management) it won the contest. While both contestants may, today, be less than happy at the outcome, Piper was the prize, not a contender. The Court is at a loss to envisage any form of equitable (or other) relief to which Piper might in reason and justice be entitled. Piper's case against Chris-Craft, like Bangor Punta's rests shakily on surmise and speculation and much of it, even if sustainable, is irrelevant to any damage which Piper does or could claim.

The counterclaim of Piper against Chris-Craft is dismissed for failure to sustain the burden of proof thereof.

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

So Ordered.

December 10, 1971

Milton Pollack
*U. S. District Judge*

## B.


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*Court of Appeals Opinion on Relief*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 672, 1055—September Term, 1974.

(Argued February 24, 1975 Decided April 11, 1975.)

Docket Nos. 74-2542, 75-7003

CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant-Cross-Appellee,*

v.

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE and THE FIRST BOSTON CORPORATION,

*Defendant-Appellees-Cross-Appellants.*

Before:

MANSFIELD, OAKES and TIMBERS,

*Circuit Judges.*

Cross-appeals from judgment entered after a hearing in the Southern District of New York, Milton Pollack, *District Judge*, pursuant to our remand for determination of damages and equitable relief to be awarded a defeated contestant for control of a target corporation resulting from defendants' violations of the federal securities laws.

Affirmed in part; reversed and vacated in part; and remanded with instructions.

ARTHUR L. LIMAN, New York City (Stuart Rabinowitz, Jack C. Auspitz, Anthony M. Radice, Richard A. Miller, and Paul, Weiss, Rifkind, Wharton & Garrison, New York City, on the brief), *for Chris-Craft Industries, Inc.*

JAMES V. RYAN, New York City (C. Kenneth Shank, Jr., Allan J. Graf, and Webster Sheffield Fleischmann Hitchcock & Brookfield, New York City, on the brief), *for Bangor Punta Corporation, Nicholas M. Salgo and David W. Wallace.*

JOHN F. ARNING, New York City (Charles W. Sullivan, Richard Urowsky, and Sullivan & Cromwell, New York City, on the brief), *for The First Boston Corporation.*

ZACHARY SHIMER, New York City (Chadbourne, Parke, Whiteside & Wolff, New York City, on the brief), *for Howard Piper, Thomas F. Piper and William T. Piper, Jr.*

LAWRENCE E. NERHEIM, General Counsel, David Ferber, Solicitor, Charles E. H. Luedde, Attorney Fellow, SEC, Washington, D.C., *for the Securities and Exchange Commission, amicus curiae.*

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TIMBERS, *Circuit Judge:*

On these cross-appeals from a judgment entered November 25, 1974 after a four day hearing in the Southern District of New York, Milton Pollack, *District Judge*, 384 F. Supp. 507, pursuant to the remand ordered in our prior decision, *Chris-Craft Industries, Inc.* v. *Piper Aircraft*





*Corp.*, 480 F.2d 341 (2 Cir.), *cert. denied*, 414 U.S. 910 (1973), for determination of appropriate relief to be awarded to Chris-Craft Industries, Inc. (CCI), the defeated contestant for control of the target corporation, Piper Aircraft Corporation (Piper), resulting from defendants' violations of the federal securities laws, the essential questions are:

(1) Whether the district court erred in the method by which it determined a compensatory damage award to CCI in amount of $1,673,988.

(2) Whether the district court erred in holding that CCI is entitled to pre-judgment interest and in refusing to award to CCI attorneys' fees and interest expense on the debt incurred by CCI to finance its acquisition of Piper stock.

(3) Whether the district court abused its discretion in fashioning equitable relief to implement our mandate.

For the reasons below, we affirm the district court's holding that CCI is entitled to pre-judgment interest, its refusal to award to CCI attorneys' fees and interest expense, and its fashioning of equitable relief: but we reverse and vacate its determination of compensatory damages due to CCI and remand with instructions to enter a modified judgment in the amount of $25,793,365, plus pre-judgment interest thereon.

## I. PRIOR PROCEEDINGS

This is the third round in this Court during the tumultuous six years of litigation stemming from the battle for control of Piper. The battle was chiefly between CCI, the unsuccessful contestant, and Bangor Punta Corporation

(BPC), the successful contestant. Others (the named defendants-appellees) whose conduct through violations of the federal securities laws contributed to the success of BPC's takeover attempt were held jointly and severally liable with BPC for damages to CCI. On this round in this Court, the issues involve the appropriateness of the relief granted by the district court pursuant to the remand ordered in our last prior decision.

We assume familiarity with our prior decisions and those of the district court involving this contest for control of Piper.[1] We shall summarize here only those facts and prior proceedings necessary to an understanding of our rulings on the essential questions stated above.

CCI began purchasing Piper shares on December 30, 1968.[2] By January 22, 1969, it had acquired more than

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1 In *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569 (2 Cir. 1970) (en banc) *(Chris-Craft I)*, we affirmed Judge Tenney's denial, 303 F.Supp. 191, of a preliminary injunction sought by CCI to prevent BPC from gaining and exercising control of Piper.

In *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2 Cir.), *cert. denied*, 414 U.S. 910 (1973) *(Chris-Craft II)*, involving consolidated appeals from three separate but related actions which had been tried before Judge Pollack, we ruled as follows:

(1) We reversed the dismissal after trial of CCI's complaint against all defendants, 337 F.Supp. 1128; held that all defendants were liable in damages to CCI for violations of the federal securities laws; and remanded the case to the district court for determination of appropriate relief to be awarded to CCI.

(2) We affirmed the dismissal after trial of BPC's complaint against CCI. 337 F.Supp. 1147.

(3) We affirmed the denial after trial of a permanent injunction sought by the SEC against BPC. 331 F.Supp. 1154.

The instant cross-appeals are from the judgment entered by Judge Pollack on November 25, 1974, 384 F.Supp. 507, pursuant to the remand ordered in *Chris-Craft II* for determination of appropriate relief to be awarded to CCI, referred to in subparagraph (1) above.

2 CCI's decision to seek control of Piper was made at a later date.



200,000 shares or approximately 13% of the 1,644,790[3] outstanding Piper shares.

On January 23, CCI announced a cash tender offer, beginning immediately and ending on February 3, to purchase up to 300,000 Piper shares at $65 per share. The closing price of Piper stock on the New York Stock Exchange (NYSE) on January 22 was $52.50. By February 3, CCI had purchased 304,606 Piper shares through tenders pursuant to its offer and an additional 38,800 shares through cash market purchases. These acquisitions brought its total holdings to 547,106 shares or approximately one-third of the outstanding Piper stock.

Piper management (essentially the Piper family) in the meantime had decided to resist CCI's takeover bid. On January 27, Piper sent a letter to its shareholders urging them to reject CCI's offer and advising them that the Board of Directors "has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders." A similar letter was mailed by Piper to its shareholders on January 28.

One early defensive tactic by Piper involved an agreement entered into on January 28 for the sale of 300,000 authorized but unissued Piper shares to Grumman Aircraft Engineering Corporation (Grumman) at $65 per share. On January 29, a press release was issued and a letter was sent to Piper shareholders announcing the agreement. These communications, however, failed to reveal a "put" arrangement between Piper and Grumman whereby the latter was given an option to put the shares back to the former after six months. This agreement was terminated on March 19 after the NYSE refused to list the new stock.

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3 Piper's annual report for 1969 states that 1,644,790 shares were outstanding. We therefore shall use that figure, as did the court below, 384 F.Supp. at 525, rather than the figure of 1,644,890 referred to in our prior opinion. 480 F.2d at 350.

Meanwhile, CCI had decided to try to obtain the additional shares it needed for control through an exchange offer of CCI securities for Piper stock. On February 27, CCI filed an S-1 with the Securities and Exchange Commission (SEC) to acquire between 80,000 and 300,000 shares of Piper. A May 7 press release announced this offer which became effective May 15. CCI's release placed no value on its exchange offer, but the First Boston Corporation (First Boston) valued it at $70 to $74 per Piper share.

During the intervening period and after its maneuvers with two other corporations had failed, Piper revived negotiations with BPC which had begun in January. On May 8, a formal agreement was entered into between BPC and the Piper family whereby the latter agreed to exchange all of its Piper holdings (501,090 shares or approximately 31% of the outstanding Piper shares) for a package of BPC securities. BPC also agreed to use its best efforts to acquire more than 50% of the outstanding Piper shares through an exchange offer which placed a value of at least $80 on each Piper share. In addition, if BPC were successful, the Piper family was to receive cash or securities, or both, to bring the value of the package of BPC securities it was to receive up to $80 or more as contrasted with the $70 to $72 value placed on it by First Boston. A press release was issued jointly by Piper and BPC that same day announcing the proposed BPC exchange offer and the $80 value it placed on each Piper share.

After issuance of the May 8 press release but prior to BPC's filing of an S-1 on May 29, BPC made cash purchases of 120,200 shares of Piper. Both before and after the BPC exchange offer became effective on July 18, the Piper family, in an effort to insure the success of BPC's offer, wrote three letters to Piper shareholders on June 4,





June 20 and July 25 disparaging CCI's offer and recommending [illegible] of BPC. The BPC offer which expired on July 29 resulted in the acquisition by BPC of 111,628 shares. First Boston acted as dealer-manager for the BPC exchange offer.

In response to the May 8 press release by Piper and BPC, CCI sweetened its exchange offer, which became effective May 15, with $10 cash through a post-effective amendment on May 16. After six extensions, this offer was withdrawn on July 24, by which time CCI had failed to obtain the minimum 80,000 shares specified in the offer. On July 22, CCI filed a registration statement for another exchange offer, effective July 24, adding substantially more value to its earlier package. Pursuant to this offer which expired on August 4 CCI acquired 112,089 shares.

After the expiration of both exchange offers, CCI and BPC had acquired 41% and 45%, respectively, of the outstanding Piper shares. CCI made additional purchases of 29,200 shares in August and then withdrew from the battle. BPC continued to purchase Piper shares until September 5, by which time it had acquired a majority shareholder position in Piper (839,306 shares or approximately 51%). As of that date, CCI had acquired 697,495 shares or approximately 42% of the outstanding Piper shares.

The instant litigation was begun on May 22, 1969, in the midst of the battle for control, when CCI commenced this action in the Southern District of New York. The complaint alleged violations of the 1933 Act and the 1934 Act. It sought damages and equitable relief.[4]

4 CCI's second amended complaint alleged violations of Section 5(e) of the Securities Act of 1933, 15 U.S.C. §77e(e) (1970), and Rule 135 promulgated thereunder, 17 C.F.R. §230.135 (1974); it also alleged violations of Sections 9, 10(b), 14(e) and 16 of the Securities Exchange Act of 1934, 15 U.S.C. §§78i, 78j(b), 78n(e) and 78p (1970), and Rules 10b-5 and 10b-6 promulgated thereunder, 17 C.F.R. §§240.10b-5 and 240.10b-6 (1974).

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On July 22, CCI moved for a preliminary injunction to prevent BPC from gaining and exercising control of Piper. The preliminary injunction was denied by Judge Tenney on August 19, 1969. 303 F.Supp. 191. We affirmed in an en banc decision on April 28, 1970. *Chris-Craft I*, note 1 *supra*.

Pursuant to our remand to the district court for further proceedings, Judge Pollack, after a bench trial, on December 10, 1971 dismissed CCI's complaint, holding that many of the alleged violations of the securities laws had not been proven, that those which had been proven had not caused injury to CCI and that CCI had failed to prove its claim for damages. 337 F. Supp. 1128.

On appeal from Judge Pollack's decision, on March 16, 1973 we reversed and remanded with directions to grant appropriate relief. *Chris-Craft II*, note 1 *supra*. We held, *inter alia*, that CCI had standing to sue for violations of Section 14(e) of the 1934 Act;[5] that each of the defendants had violated that section and that those violations had caused injury to CCI; and that BPC's violations of Rule 10b-6[6] through its May cash purchases of Piper stock also had caused injury to CCI.

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5 Section 14(e), 15 U.S.C. §78n(e) (1970), provides in relevant part:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. . . ."

6 Rule 10b-6 prohibits bids for or purchases of a security or any right to purchase any such security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution." 17 C.F.R. §240.10b-6 (1974). On May 5, 1969, a few days prior to BPC's cash purchases of Piper stock in May, the SEC promulgated a revision of proposed Rule 10b-13 which dealt specifically with exchange offers and, when adopted, would have prohibited BPC's purchases. SEC Exchange Act Release No. 8595 (May 5, 1969). Rule 10b-13 was not adopted until October 15, 1969 and therefore was not applicable to BPC's May purchases. 17 C.F.R. §240.10b-13 (1974). 34 Fed. Reg. 15,839 (October 15, 1969).



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In order to understand our rulings on the issues raised on the instant appeal, we shall summarize briefly the basis of our decision on the last prior appeal with respect to the liability of each of the defendants.

With respect to the Piper family defendants, we held that they had violated Section 14(e) through: (1) the material misleading statements in their letters of January 27 and 28 to Piper shareholders which said that the pending CCI tender offer of $65 was "inadequate" but which failed to reveal that Piper had received from First Boston its opinion that the CCI offer was "fair and equitable" and that Piper itself was negotiating a large sale of Piper stock to Grumman at the same price; (2) the January 29 press release and shareholder letter which announced the Grumman agreement but failed to disclose the "put" arrangement, that being a material omission; and (3) the June and July shareholder letters which, while disparaging the CCI offer and promoting the BPC offer, failed to reveal that the Piper family stood to profit handsomely under the May 8 agreement should BPC gain control. 480 F.2d at 364-66. We held that all but the third violation (that having been disclosed by a CCI letter to Piper shareholders on June 16) caused injury to CCI by denying it "a fair opportunity to win the contest for control." 480 F.2d at 377.

With respect to BPC and its officers, we held that they had violated Section 14(e) by reason of BPC's failure to disclose in its exchange offer registration statement its negotiations for the sale of its 98.7% holdings in the Bangor and Aroostook Railroad (BAR) at a price some $13 million below the figure of $18.4 million at which the

BAR was carried on BPC's books and its failure to disclose other circumstances which indicated that the BAR book value was unrealistic and obsolete. 480 F.2d at 367-69. As for the May 8 press release, we held, although it violated Section 5(c) of the 1933 Act (as we had held in our earlier en banc decision, 426 F.2d at 573-76), that it was not misleading and therefore not damaging to CCI. 480 F.2d at 366-67.

With respect to First Boston, we held that the material deficiencies in BPC's registration statement and prospectus also provided the basis for Section 14(e) liability on the part of First Boston, the underwriter and dealer-manager for the BPC exchange offer, in that First Boston had not adequately performed its duty in failing to make a reasonable further investigation into the BAR matter when it was aware of facts that strongly suggested that the BPC registration materials were deceptive. 480 F.2d at 369-73.

On the basis of the Section 14(e) violations outlined above, we held that the record established that the injuries sustained by CCI were caused by such violations on the part of the Piper family defendants, BPC and its officers, and First Boston. 480 F.2d at 377. Although we agreed with the district court that "CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston", we held that "it is equally clear that BPC itself obtained control through its violations of the securities laws." 480 F.2d at 373. We further held that "What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control." 480 F.2d at 375.

We also held in our prior opinion that BPC had violated Rule 10b-6 through its May cash purchases of Piper stock.





480 F.2d at 377-79. As in the case of BPC's Section 14(e) violations, we concluded that, since BPC eventually acquired only 51% of the Piper stock, those unlawful purchases of three large blocks of Piper stock were crucial to its success. BPC's unlawful conduct denied CCI a fair chance to compete for control and enabled BPC to obtain a majority position which caused CCI to suffer a decline in the value of its Piper holdings. 480 F.2d at 379.

Having concluded that all defendants had violated the securities laws, we remanded the case to the district court with directions to enter a judgment providing at least the following relief (480 F.2d at 380):

> (1) Damages, to be assessed against all defendants jointly and severally,[7] to be measured by "the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time."
>
> (2) An injunction enjoining BPC from "voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer."

On remand, the court awarded CCI compensatory damages in amount of $1,673,988, plus pre-judgment interest in

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7 No liability was imposed on defendant Piper Aircraft Corporation itself since it was not a perpetrator of the violations of the securities laws. Members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. 480 F.2d at 379 n. 34. The district court correctly characterized Piper as "the prize in the battle, not a contender." 337 F.Supp. at 1146.

With respect to two officers of First Boston who were named as defendants (Paul L. Miller and Nicholas H. Bayard), on remand CCI stipulated to dismiss the complaint against them, 384 F.Supp. at 510 n. 1, pursuant to our amendment of our prior opinion on petition for rehearing. 480 F.2d at 407.

amount of $599,010.89. It refused to award to CCI attorneys' fees and interest expense on the debt incurred by CCI to finance its acquisition of Piper stock. It included in the judgment injunctive provisions essentially as follows: BPC was enjoined from voting the 231,002 shares it acquired in violation of Section 14(e) and Rule 10b-6 for a period of five years; such shares were not to be counted for the purpose of determining a quorum at shareholders' meetings; such shares were to be considered authorized and outstanding for all purposes under Pennsylvania law and under the judgment; all changes made in Piper's by-laws and in the size of its board since September 4, 1969 were to be rescinded; and no changes were to be made in Piper's by-laws, the size of its board or its corporate charter, unless agreed to by both CCI and BPC or ordered by the court.

We turn now to the issues raised with respect to the district court's formulation of damages; its holdings on CCI's claims for pre-judgment interest, attorneys' fees and interest expense; and its grant of injunctive relief.

## II. Damages

### (A) *District Court's Formulation Of Damages*

Upon remand the district court held a four day hearing. It received extensive testimony and supporting reports from experts called by both sides on the amount of damages to be awarded to CCI to compensate it for the injury it sustained as the result of defendants' violations of the federal securities laws. The court admitted all evidence offered,[8] subject to its determination of what it believed

8 The testimony and reports of the experts covered a wide range of proposed valuations of CCI's block of Piper stock at various times and under varying methods of valuation and assumptions.

The evidence included valuations of CCI's holdings as of August 7, 1969 (the date on which BPC's limited exchange offer for the Piper family's stock became effective and subsequent to the close of both the BPC and CCI exchange offers) and as of September 5, 1969 (the date BPC gained a majority of Piper stock). Two valuations were offered for each date. The first was premised upon CCI's trailing BPC on those dates (45% to 41% on August 7, 51% to 42% on September 5). The second assumed that, if the 14% of Piper stock illegally acquired by BPC were eliminated, CCI led the contest on those dates (41% to 31% on August 7, 42% to 37% on September 5).

The valuations offered included not only the fair market value and value in a statutory appraisal proceeding of CCI's block of Piper, but also such semantic variations as its "investment" value, its "intrinsic" value, and its market "value" as opposed to its market "price".

And expert opinions were expressed with respect to the price that would be obtained for CCI's Piper shares at hypothetical public and private sales.



to be an appropriate formula for assessing damages. It emerged with a formula substantially as follows.

The court first accepted the general proposition, to which both sides agreed, that our mandate required a comparison of the value of CCI's Piper holdings "prior and subsequent to BP's[9] acquisition of majority ownership." 384 F.Supp. at 512. The court then hypothesized that, in order to make such a comparison, it was necessary to value CCI's holdings both in the situation as it actually existed on September 5[10] and as it theoretically would have existed absent BPC's holding the 14% of Piper stock which it had acquired unlawfully:

9 The district court's opinion uses the abbreviations BP and CC for Bangor Punta Corporation and Chris-Craft Industries, Inc., respectively. We shall continue to use the same abbreviations, BPC and CCI, as we did in our prior opinion.

10 CCI initially urged that the valuation date should be August 7, 1969, but ultimately joined with BPC in agreeing that September 5 was the appropriate date for valuation purposes. 384 F.Supp. at 512 n. 4. We agree that the relevant date is September 5 since that is the date BPC gained a majority shareholder position. Moreover, the record shows that no expert who testified would value the CCI block differently on those two dates, using identical assumptions and valuation methods for each date.

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"Since the inquiry here is to determine the damage suffered by CC *attributable to BP*, it is therefore appropriate to determine what the value of CC's block of stock *would have been worth* on September 5 *absent* BP's illegal conduct, i.e., if CC on that date had led in the contest 42% to 37%. In turn it must be determined how that value was affected by BP's taking a majority position and reducing CC to a minority position." 384 F.Supp. at 512 (emphasis in original) (footnote omitted).

To define the elements of that value, the court focused on our direction that "the measure of damages should be the reduction in the appraisal value of CCI's Piper holdings" attributable to BPC's unlawful acquisition of a majority position. Interpreting this phrase literally, the court concluded that, in the context of our reference to BPC's "being able to compel a merger at any time", our use of the talisman "appraisal value" meant a statutory appraisal proceeding available to dissenting shareholders in a merger situation. 384 F.Supp. at 513.

Elaborating on this measure of value, the court continued:

"Obviously, the objective components of that value, as recognized by the experts—such as asset value, and market value—remained unchanged in BP's gaining a majority. The relevant block for purposes of such an evaluation is merely an anonymous 100-share block, and each of the experts so proceeded. The 'value' of such a block was not altered by BP's unlawful conduct." 384 F.Supp. at 514.

Having concluded that there was no reduction in the intrinsic value of the block of Piper shares held by CCI,



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the court looked to extrinsic value. In so doing, it utilized the concept of a "premium" for the "opportunity to gain control":

"Consequently, the only issue for determination is what *premium* CC's block would have commanded that disappeared once BP took 'control'. CC is presently in a position no different from that of any minority owner (albeit a large one) of any publicly held corporation. Only that premium representing the value of CC's opportunity to gain control has been removed. Thus, it is the removal of that premium which represents the reduction in value of CC's Piper holdings attributable to BP's acquisition of majority ownership." 384 F.Supp. at 514 (emphasis in original).

The first step in the court's attempt to value CCI's lost opportunity to gain control was a determination of the fair market value of Piper stock on September 5 uninfluenced by the fight for control:

"Once the fair market value is determined, the value of CC's opportunity to gain control can be evaluated by determining the value of actual possession of control of Piper to CC. That value will be a figure that must be discounted by the factors of probability of success, time, and the economic benefit of that control to CC's holdings." 384 F.Supp. at 515.

After summarizing the expert testimony offered by both sides, 384 F.Supp. at 515-17, the court averaged the computations of all of the witnesses and concluded that "a round figure of $48. per share seems a reasonable and justifiable estimate of the fair market value per share of Piper stock as of September 5, 1969." 384 F.Supp. at 517.

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Turning next to the problem of quantifying the premium the court thought represented the value of CCI's opportunity to gain control, it theorized that this necessitated "a determination of the value of ultimate control of Piper to CC." 384 F.Supp. at 517. While acknowledging that payment of premiums for control is a well-recognized phenomenon in the American corporate system and that there are tangible benefits to be derived from having control, 384 F.Supp. at 517-18, the court was at a loss to explain what CCI hoped to gain by achieving control of Piper beyond the possibility of a later sale or take-out of its investment.[11] *Id.* at 518-19.

Unable to quantify CCI's subjective expectations of what it could do with control, the court opted for a hypothetical sale of CCI's hypothetical plurality position on September 5:

> "In light of the inability to affix a value to CC's unsuccessful quest for control of Piper (and hence a value to CC for its opportunity to gain that control), the only accurate way of measuring the value of CC's lead position is to determine what CC's position on September 5 was worth to a hypothetical reasonable purchaser." 384 F.Supp. at 520 (footnote omitted).

In the court's view, the value of CCI's plurality position to the unlikely purchaser who would be willing to step into CCI's shoes to continue the control battle would have been substantially reduced not only by BPC's tenacious opposition and its commitment to use every resource available to win the contest but also by the fact that the Piper family and management adamantly opposed CCI's takeover bid. Although two of CCI's experts placed the premium value of CCI's hypothetical plurality block as high as 40% above

11 The record shows that the court questioned each expert extensively on the possible benefits CCI might hope to gain by achieving control of Piper.



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its fair market value, the court credited the testimony of one of defendants' experts, Donald R. Gant, that the premium would be between 5% and 10%. The court referred to Gant as follows:

> "Gant was the only expert to directly explain and quantify the premium that is at the base of this Court's determination, i.e., the premium that exists in a large minority block when that is counterbalanced by another block almost as large that stands in the way of full harmonious utilization of ultimate control if and when that may be acquired." 384 F.Supp. at 523.

The court held that "the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances." *Id.* (emphasis in original).

Taking the valuation of that opportunity at 5% and applying that figure to the $48 per share valuation at which it had previously arrived, the court considered that the total damage to CCI came to the quite insubstantial sum of $2.40 per share. The court thus concluded that the total damages to be awarded to CCI were $1,673,988 (i.e. $2.40 times 697,495, the total number of shares held by CCI on September 5, 1969).

(B) *Error In District Court's Formulation Of Damages*

Mindful of the difficult task that confronted the district court in evaluating the extensive expert testimony received at the hearing pursuant to our remand, we nevertheless hold that the court erred in its formulation of the measure of damages to be awarded to CCI.[12]

12 Although we hold that the district court applied an improper legal standard to the facts in formulating the measure of damages to be awarded to CCI, we nevertheless again commend Judge Pollack, as we did in our prior opinion, 480 F.2d at 349-50, upon the clarity of his latest opinion in this complex case.

While the court correctly read our mandate as requiring comparison of the value of CCI's Piper holdings "prior and subsequent to BP's acquisition of majority ownership", 384 F.Supp. at 512, we hold that it erred in proceeding on the assumption that the "appraisal value" of CCI's holdings remained unchanged when BPC gained a majority position and in valuing CCI's holdings by resort to an "anonymous 100-share block". *Id.* at 514.

Moreover, the court erroneously assumed that our phrase "appraisal value" referred to a statutory appraisal proceeding. Such connotation, had we intended it, would have justified the conclusion that there had been no reduction in the value of CCI's Piper holdings upon BPC's gaining control. Our opinion in *Chris-Craft II*, however, expressly forecloses any such intention. We pointed out at least three times that CCI had sustained injury as the result of BPC's unfairly gaining control and that the injury sustained was a decline in the value of CCI's Piper holdings. First, in assessing the impact of defendants' Section 14(e) violations upon CCI, we stated:

> "The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. . . ." 480 F.2d at 375.

Second, in evaluating the damaging effect of BPC's violations of Rule 10b-6, we held:

> "BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." 480 F.2d at 379.

Third, in our mandate with respect to the proper measure of damages, we said:

> "The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position. . . ." 480 F.2d at 380.





Accordingly, the court's assumption that there had been no such reduction in the value of CCI's Piper holdings was the first step in reaching an erroneous formulation of damages.

This error was compounded by the court's resort to an "anonymous 100-share block" in valuing CCI's Piper holdings. The use of such a block fails to recognize that on September 5, 1969, CCI held an illiquid 700,000 share minority block. This cannot be compared to a freely marketable block of shares, as we pointed out in our prior decision in the context of defendants' Section 14(e) violations:

> "CCI is entitled to compensatory damages for the decline in the value of the *minority shareholder's interest with which it became encumbered* as a result of competing against those who violated the securities laws." 480 F.2d at 376 (emphasis added).

We surely would not have referred to CCI's interest as being encumbered had we visualized it as having the characteristics of a freely marketable 100 share block. Ownership of 700,000 shares representing 42% of a company's stock can hardly be equated to ownership of 100 shares,[13] especially when counterbalanced by a majority block of 839,000 shares, with only 108,000 other shares outstanding.

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13 In tax cases dealing with the valuation of gifts of large blocks of securities, the principle of "blockage" has long been recognized. *Rushton* v. *Commissioner*, 498 F.2d 88 (5 Cir. 1974); *Warner* v. *Commissioner*, 193 F.2d 328 (2 Cir. 1952); *Richardson* v. *Commissioner*, 151 F.2d 102 (2 Cir. 1945), *cert. denied*, 326 U.S. 796 (1946); *Bull* v. *Smith*, 119 F.2d 490 (2 Cir. 1941). This principle in essence is that the fair market value of a large block of stock actually may be substantially less than the

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Proceeding on these two erroneous assumptions, the court believed that it had to determine the value of CCI's lost "opportunity to gain control" in order to find that CCI had sustained any loss at all upon BPC's obtaining a majority. On that premise the court then ventured into the realm of sheer conjecture in trying to quantify the subjective value to CCI of such control.[14] 384 F.Supp. at 517-23. We agree with the court that valuing the hypothetical premium that CCI's holdings would have commanded from a hypothetical buyer in a hypothetical sale was "well-nigh an impossible task". 384 F.Supp. at 514. See *United States* v. *Byrum*, 408 U.S. 125, 137 n. 10, 138 n. 13 (1972). But we hold that the court erred in assuming that our mandate required it to make such a valuation.

In short, we hold that, in failing to recognize a reduction in the value of CCI's Piper holdings upon BPC's obtaining a majority and in resorting to an anonymous 100 share block for purposes of valuation, the court erred in its formulation of the measure of damages to be awarded to CCI by not carrying out the mandate of our prior decision. See *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 341 (2 Cir. 1973).

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quoted market price because of the inability of the market to absorb a sale of the entire block. Counterbalancing the depressant effect of such a liquidation is the possibility that "a skillful broker could within a reasonable period" liquidate the block in smaller lots at a higher price, *Bull* v. *Smith*, *supra*, 119 F.2d at 492, or the possibility of a secondary distribution. *Warner* v. *Commissioner*, *supra*, 193 F.2d at 329.

14 The court attempted two alternative quantifications of this value. The first, aimed at measuring the subjective value of control to CCI, failed because no witness was able to value the bundle of advantages CCI hoped to gain by acquiring control. 384 F.Supp. at 517-20, 521-22. The second, aimed at measuring the objective value of CCI's position to a hypothetical purchaser, resulted in the court's finding a premium of $2.40 per share for CCI's opportunity to gain control. 384 F.Supp. at 520-21, 522-23.



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(C) *Correct Formulation Of Damages*

As indicated above, the district court correctly accepted the proposition to which both sides agreed that our mandate required a comparison of the value of CCI's Piper holdings both before and after BPC acquired a majority shareholder interest on September 5, 1969. 384 F.Supp. at 512. For the reasons that follow, we hold that the "before value" requires consideration of the prices actually paid by the parties for their acquisitions of Piper stock, while the "after value" should be measured by the price at which CCI could have sold its holdings subsequent to September 5.

Our use of the term "appraisal value" in *Chris-Craft II*, 480 F.2d at 380, in the context of measuring CCI's damages, most assuredly did not contemplate that a valuation of CCI's holdings prior to BPC's acquisition of control would result in a figure less than the price actually paid by CCI for such stock. On the contrary, we contemplated a determination of what premium would have to be added to the price actually paid to reflect the value of CCI's block with its opportunity to acquire control.

The court below failed to perceive the relevance of these figures. In rejecting the actual prices paid as not probative of the value of CCI's holdings before BPC gained a majority position, the court reasoned:

> "The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant herein. . . . The amounts paid were clearly wildly and artificially inflated due to the emotional, as well as actual, struggle of the parties. Such amounts, therefore, must be discarded . . . ." 384 F.Supp. at 515 n. 8.

We recognize that tender offers, like other contests, do not take place " 'in the peace of a quiet chamber' ", but "under

the stresses of the market place." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969). In our view, however, the prices paid in the battle for control of Piper represented what astute businessmen, competing in a free market, thought potentially controlling blocks of Piper stock were worth.[15] As one of our late colleagues astutely observed a half century ago:

> "When all is said, value is nothing more than what people will pay for the shares, given as wide an opportunity for bidders to come in as is reasonably possible." *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2 Cir. 1925) (L. Hand, *J.*).

Here the contemporary evaluations of Piper stock by BPC and CCI, backed up by cash on the barrelhead, strike us as more realistic and persuasive indicators of value than experts' conceptual appraisals years later based on hypothetical smaller lots. Cf. *Cities Service Co.* v. *United States*, —— F.2d ——, —— (2 Cir. 1974), slip op. 737, 756 (December 13, 1974). We hold that valuation of CCI's Piper holdings prior to BPC's obtaining a majority position should be based on the prices actually paid.

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15 This accords with the district court's observation after the first trial:

> "The contest for control of Piper was sophisticated and hard fought. The contenders were men accustomed to the handling of vast sums of public capital, were assisted by skilled professionals and were themselves seasoned in corporate tactics." 337 F.Supp. at 1131.

We find unpersuasive the arguments of counsel for BPC that the prices paid by the contestants were "irrational", in view of the testimony of David W. Wallace, President of BPC, that PBC had carefully evaluated Piper before seeking control and that he believed BPC had proceeded wisely in going ahead with the Piper acquisition despite the cost involved. Since by its own admission BPC thought Piper stock was worth the price paid, it should not be heard to complain that the price was excessive. *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 31, 119 N.E. 85, 86 (1918) (Cardozo, *J.*).



This of course is only the starting point in determining the reduction in value of CCI's Piper holdings due to BPC's unlawful acquisition of control. The value of CCI's block subsequent to that event must also be determined. The correct measure of that value subsequent to September 5 is the price at which CCI could have sold its shares. See *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2 Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94, 104-05 (10 Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). This follows at least in part by analogy to the valuation of CCI's holdings before BPC acquired control based on the prices actually paid. But unlike the "before value" which can be measured by the prices actually paid by the parties, there are no actual figures for the "after value" since CCI never sold its holdings. It is necessary to resort to expert testimony to establish the price at which CCI could have sold its 41% minority position after BPC acquired control.

Since the district court erred in its formulation of the measure of damages to be awarded to CCI, its findings do not contain a proper valuation of CCI's holdings either before or after BPC obtained control. There is evidence in the record, however, to establish those values.[16] Especially since the critical evidence is largely documentary, including the written reports of the experts, we believe this is an appropriate case for us to formulate the correct measure

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16 We recognize that in certain types of cases the failure of the trial court to make necessary findings of fact on the issue of damages requires a remand for such findings. See *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956); *Alexander* v. *Nash-Kelvinator Corp.*, 261 F.2d 187, 191 (2 Cir. 1958). This is especially true in a personal injury case tried to the court where a money judgment necessarily is based on the intangible elements of pain and suffering. In such a case, the trial court's evaluation of the testimony of the witnesses would be crucial. See *Mitchell* v. *Evelyn C. Brown, Inc.*, 310 F.2d 420, 425 (1 Cir. 1962).

The instant case is quite different. Here the critical evidence is largely documentary. The testimony of the experts essentially tracks their extensive written reports.

of damages based on the record. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2 Cir. 1972); *Simpson* v. *United States*, 322 F.2d 688, 693 (5 Cir. 1963); *Dale Benz, Inc., Contractors* v. *American Casualty Co.*, 303 F.2d 80, 82 (9 Cir. 1962); *McComb* v. *Utica Knitting Co.*, 164 F.2d 670, 674 (2 Cir. 1947); 9 Wright & Miller, Federal Practice & Procedure §2577, at 701 (1971).

There is another reason for our decision not to remand for another hearing on damages. That is "the extraordinary length of time this litigation has already lingered." *Georgia-Pacific Corp.* v. *U. S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299 (2 Cir.), *cert. denied*, 404 U.S. 870 (1971). This case is now in its sixth year of litigation. This is the third appeal to our Court. We have no doubt that, given the tenacity of both sides, a remand would result in still another appeal some two years hence. The ultimate determination of the value of CCI's holdings before and after BPC obtained control in the end would be made by us on the basis of essentially the same record now before us. To remand the case in the light of such a prospect would be a waste of judicial manpower. *Seergy* v. *Kings County Republican County Committee*, 459 F.2d 308, 313 (2 Cir. 1972). We hold that, in the public interest, as well as in the best interests of the parties, it is appropriate, just and within our power to formulate, on the basis of the record now before us, the correct measure of damages and to order that a modified judgment for damages be entered accordingly. 28 U.S.C. §2106 (1970).[17] See *Petition of*

17 28 U.S.C. §2106 (1970) provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."



*United States Steel Corp.*, 479 F.2d 489, 500-01 (6 Cir.), *cert. denied*, 414 U.S. 859 (1973); *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc., supra*, 446 F.2d at 299; *Alexander* v. *Nash-Kelvinator Corp.*, 271 F.2d 524, 527-28 (2 Cir. 1959).

In formulating the correct measure of damages and modifying the judgment, however, we proceed within certain limits. In modifying the judgment to increase the award of compensatory damages, as the record clearly requires, we believe that the upper limit is the minimum amount of damages that the district court could have awarded without committing reversible error. *Petition of United States Steel Corp., supra*, 479 F.2d at 501; *Traylor* v. *United States*, 396 F.2d 837, 840 (6 Cir. 1968); *Mitchell* v. *Evelyn C. Brown, Inc.*, 310 F.2d 420, 426 (1 Cir. 1962); *United States Fidelity & Guaranty Co.* v. *United States*, 152 F.2d 46, 49 (2 Cir. 1945).

With this in mind, we hold that the lowest figure at which the district court could have valued CCI's Piper holdings prior to BPC's acquisition of control was CCI's total cost—an aggregate of $44,628,267 for 697,495 shares, or an average of $63.98 per share. 480 F.2d at 354-55. As indicated above, in valuing potentially controlling blocks of shares in a target corporation, great weight must be given to the prices actually paid by businessmen competing in the marketplace for shares to build up their holdings. On the record before us, there is no better indicator of the value of CCI's block than its cost to CCI. Our prior opinion contemplated the determination of a premium, which would have been paid for CCI's opportunity to obtain control, over and above the actual cost to CCI of Piper shares. Such premium, added to CCI's cost, would establish the correct value of CCI's block. Since the minimum amount

of that premium would be zero,[18] the lowest possible value of CCI's block therefore would be its cost.

This use of CCI's cost, moreover, gives defendants the benefit of the doubt since it results in a per share valuation of CCI's Piper stock of close to $64—the average price paid by CCI. BPC paid $70 to $80 per share for its acquisitions of Piper stock. According to the testimony of its president, BPC thought it had made a sound investment at those prices.[19] Defendants should not be heard to complain of the use of CCI's substantially lower cost.

In using CCI's average cost of $64 per share in formulating a measure of damages, we recognize that CCI incurred a normal market risk in paying a sizeable premium above the then current NYSE price for its purchases of Piper stock. It knew that if it lost in a fair battle it would face the possibility of incurring substantial losses in disposing of its Piper holdings should it decide at that point to sell. In that event it might very well have been forced to shoulder by itself the entire loss measured by the above formula, i.e. the difference between its cost and the price it could obtain for its holdings as a 42% minority shareholder.

We squarely held in *Chris-Craft II*, however, that CCI did not lose in a fair battle. Although we recognized that CCI had not demonstrated that it would have obtained a controlling position in Piper absent defendants' violations of the securities laws, it was "equally clear that BPC itself obtained control through its violations of the securities laws." 480 F.2d at 373. Defendants' unlawful acts caused "a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's

18 The district court indicated that this might be so here. 384 F.Supp. at 517-23.

19 See note 15 *supra*.



unfairly obtaining control." 480 F.2d at 375. CCI's payments for Piper stock included a substantial premium for the opportunity to compete for control. Defendants' violations unlawfully deprived CCI of that opportunity. We hold that there is no inequity under these circumstances in shifting the entire burden of CCI's loss to defendants. To do so will effectuate congressional intent that "contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." 480 F.2d at 375.

Nor do we believe that our formulation of damages results in an improper award to CCI for the value of control, as the court below intimated. 384 F.Supp. at 520. In its attempt to quantify the premium which CCI might have commanded for its shares absent BPC's unlawful conduct, the court, citing *Perlman* v. *Feldmann*, 219 F.2d 173 (2 Cir.), *cert. denied*, 349 U.S. 952 (1955), expressed doubt that CCI could properly retain any premium it might realize upon a hypothetical sale of its "plurality" position, since any sale of its potential to acquire control might make it accountable to other shareholders.

Assuming arguendo the correctness of the proposition for which *Perlman* was cited by the district court, we have carefully considered whether our use of CCI's cost in our formulation of damages results in an improper award to CCI for its opportunity to compete for control, to the extent that CCI's cost exceeded the "fair market value" of $48 as found by the court below. In the instant case, we are not dealing with the sale of control by an entrenched majority shareholder to the detriment of the company or its minority shareholders as in *Perlman*. At no time has CCI had control. It has had at most a plurality position in a battle for control. Any premium it might have been able to command for its plurality position would not have harmed Piper or its minority shareholders. All shareholders, including those who became minority public share-

holders, had the opportunity on an equal basis to sell their shares at the premiums which the contestants offered. It is doubtful whether CCI, which never was in control, owed any fiduciary duty to Piper or its shareholders with respect to the price at which it might sell its plurality shares. In short, we are not here concerned with the sale of control in the context of a possible breach of fiduciary duty.

For these reasons, we hold that in formulating the correct measure of damages it is proper to use CCI's cost to value CCI's Piper holdings before BPC's acquisition of control.

We turn next to the valuation of CCI's Piper holdings after BPC acquired control. The record discloses that no expert testified that in his opinion CCI could have sold its Piper holdings on the Philadelphia-Baltimore-Washington Stock Exchange where Piper stock was being traded on September 5, 1969. Such a disposition would not have been feasible in view of the large size of CCI's holdings (approximately 700,000 shares) compared with the small number of Piper shares publicly held by others than BPC and CCI (approximately 108,000 shares).[20] The experts did testify that disposal of CCI's Piper holdings was possible only through a public offering or a private placement.

The private placement alternative, according to the experts, was not realistic. Although they considered the possibility of placing privately CCI's 42% minority interest, none believed that such a sale, either to another company or on an investment letter basis, was feasible. Indeed, defendants' witness Donald R. Gant, who was highly credited by the district court, essentially disavowed such a possibility. His view was concurred in by two of plaintiff's witnesses, Sigmund Wahrsager and Robert Rosenkranz. Gant testified that, assuming CCI was desperate to unload its Piper holdings on September 5 and further assuming

20 See note 13 *supra*.



that it had a commitment from BPC and Piper to cooperate in an underwriting by the purchaser at some later time, it would have been possible to effect a private placement at a substantial discount (25-30%) below what CCI could realize in a public offering. However, there was no commitment to register.

Since the record shows that the chances of a successful private placement were slim compared with a successful public offering and the price which CCI could have obtained through a public offering was substantially higher, we hold that it is appropriate to compute the value of CCI's Piper holdings after BPC acquired control based on a hypothetical public offering. The evidence as to the price which CCI could have obtained through a public offering was primarily the testimony of two witnesses.[21] Defendants' witness Gant testified that in his opinion a public offering on September 5 would have produced for CCI net proceeds after underwriting fees and other expenses of $41.60 to $43.50 per share. Plaintiff's witness Wahrsager testified that, in view of the necessity for audited financial statements of Piper's fiscal year ending September 30, 1969 before there could be a public offering and allowing time for the registration process, the earliest realistic date for a public offering of CCI's Piper holdings was the end of January 1970. At that time in his opinion CCI would have realized $27 per share.[22]

21 Although other witnesses called by both sides testified to valuations of CCI's block of Piper shares after BPC gained a majority, they did not base their opinions on a proposed public offering. Aubrey B. Lank, defendants' witness, based his valuation solely on the amount that could be obtained in a statutory appraisal proceeding. Although plaintiff's witnesses Robert F. Murray and Robert Rosenkranz addressed themselves to the problems of a public offering, they did not specifically premise their valuations on such an offering.

22 Wahrsager also testified that, if all necessary steps could have been accomplished by the end of November 1969, in his opinion CCI would have realized $33 per share through a public offering at that time.

We hold, on the record as a whole, that the Wahrsager figure of $27 represents the most realistic price that CCI could have obtained through a public offering. Gant's assumption that CCI could have made a public offering on September 5, the very day BPC gained a majority, is untenable. Gant himself testified that an offering would have required a registration statement or a no-action letter from the SEC. He based his hypothetical offering on the assumption that a registration statement would have been available as of September 5. He admitted, however, that this would have required a decision by CCI in August that it no longer had any chance to win and that it should dispose of its holdings through a public offering. Leaving aside whether CCI could have proceeded with a public offering based on audited financial statements for the nine months ending June 30, 1969 and even if the cooperation of BPC and Piper in the registration process could have been obtained, it is clear that the battle for control continued at least until August 18 when CCI made its last purchase of Piper stock. In view of the untenable assumptions on which Gant based his opinion, we hold that it was seriously undermined.

Aside from the infirmity of Gant's opinion, we would be constrained to use Wahrsager's figure under the long established principle for computing damages which was reaffirmed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), where the Court stated that "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.* at 265. Here the uncertainties inherent in computing the price which CCI's Piper holdings reasonably would have been expected to bring at a public offering, including the problems of adequate financial statements, delays and market conditions,



must be resolved against defendants. This accords with our prior opinion:

> "By 'resolving doubts in favor of those the statute is designed to protect', Mills v. Electric Auto-Lite Co., [396 U.S. 375, 385 (1970)] we are implementing congressional intent not only to protect investors, but to make sure that contests for control between offerors and incumbent management, or other offerors, shall proceed fairly." 480 F.2d at 375.

We hold on this record that it is appropriate to use Wahrsager's figure of $27 per share as the price which CCI could have obtained for its Piper holdings at a public offering after BPC acquired control.[23]

To summarize on the issue of damages, we hold that the correct formula for determining CCI's damages is the difference between the price CCI paid for its Piper stock ($63.98) and the price it could have obtained for it through a public offering after BPC unlawfully acquired control ($27). This results in damages of $36.98 per share, or a total of $25,793,365, for CCI's block of 697,495 shares.[24]

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23 One of CCI's proposals on the instant appeal is that we require BPC to purchase CCI's block of Piper either at its cost (an average of $64 per share), or at its market value as estimated by CCI's expert Wahrsager ($72 per share), since CCI had no practical way to dispose of its holdings. We reject this proposal, however, because it is belied by the assumed hypothetical sale relied on by the experts in valuing CCI's block after BPC took control. See p. 2863 *infra*.

24 Approximately the same award of damages would result if we were to accept Gant's testimony regarding a private placement of CCI's 42% minority interest.

The district court, as we have indicated, p. 2845 *supra*, relied on Gant's testimony in arriving at a premium of 5% to be added to the fair market value of CCI's holdings to show the value of CCI's plurality with its opportunity to gain control. The addition of this 5% premium to the $64 per share value of CCI's Piper block at which we previously

We therefore vacate the district court's determination of damages due to CCI and remand with instructions to enter a modified judgment in amount of $25,793,365, plus pre-judgment interest thereon.

## III. Pre-Judgment Interest, Interest Expense and Attorneys' Fees

The district court on remand also awarded CCI pre-judgment interest from September 5, 1969 on the damages awarded. The court, however, refused to award to CCI its interest expense on the debt it incurred to finance its acquisition of Piper stock, and it refused to award to CCI attorneys' fees. We affirm the district court's holdings with respect to each of these matters.

An award of pre-judgment interest in a case involving violations of the federal securities laws rests within the equitable discretion of the district court to be exercised

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have arrived, p. 2854 *supra*, would result in a per share valuation of $67.20 for CCI's Piper holdings prior to BPC's acquisition of control.

Gant testified, see p. 2856 *supra*, that it would have been possible to sell CCI's block on September 5, 1969 to private investors who were looking to be bailed out in a future public offering if BPC and Piper were willing to commit themselves to cooperate in such an offering. Such a sale, however, could be made only at a substantial discount (25% to 30%) below what he thought CCI could obtain in a public offering (net proceeds to CCI of $41.60 to $43.50). While there was no such commitment on September 5, it is realistic to assume that, had CCI approached BPC and Piper on that date and asked for their cooperation, they would have cooperated in order to reduce their exposure to the possibility of a large damage award in the event CCI should prevail in its lawsuit.

Taking Gant's testimony most conservatively, for the reasons previously stated, pp. 2853-54 *supra*, the application of a 25% discount to Gant's hypothetical offering price of $43.50 would result in an "after value" of $32.62 per Piper share in the formulation of damages. As a check for accuracy, that figure is close to Wahrsager's estimate of $33 for a November 1969 public offering. See note 22 *supra*.

If we were to calculate CCI's damages based on this alternative formula, the result would be $34.58 per share ($67.20 minus $32.62) or a total of $24,119,377.



according to considerations of fairness. *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962); *Wolf* v. *Frank*, 477 F.2d 467, 479 (5 Cir.), *cert. denied*, 414 U.S. 975 (1973); *Norte & Co.* v. *Huffines*, 416 F.2d 1189, 1191-92 (2 Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). Such an award must be compensatory and not punitive. *Norte & Co.* v. *Huffines*, *supra*, 416 F.2d at 1191-92. It is not limited to "a rigid theory of compensation for money withheld", as defendants here contend. *Blau* v. *Lehman*, *supra*, 368 U.S. at 414, quoting from *Board of Commissioners* v. *United States*, 308 U.S. 343, 352 (1939). In view of the long delay since the action was commenced and CCI's otherwise nonreimbursable expenses, including attorneys' fees and interest expense, we hold that the district court did not abuse its discretion in awarding pre-judgment interest. *Norte & Co.* v. *Huffines*, *supra*, 416 F.2d at 1192.

The court awarded pre-judgment interest at the legal rate from September 5, 1969, the award of interest being $599,010.89 based on a damage award of $1,673,988. Interest was computed at the rate of 7½% per annum from September 5, 1969 to August 31, 1972, and thereafter at 6%. N.Y.C.P.L.R. §5004 (McKinney Supp. 1974-1975).

Defendants do not challenge the court's power to award the legal rate of interest but only its computation. They argue that the 1972 amendment to Section 5004 which substituted "at the rate of six per centum per annum" for "at the legal rate"[25] is retroactive and that only the 6% rate should have been used in computing interest here. The New York state courts which have spoken on the question have been unanimous in holding that the amendment is not retroactive. *7 Doyer Street Realty Corp.* v.

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25 Prior to September 1, 1972, the legal rate of interest in New York was set by the state banking board at 7½%. Effective that date, the rate was reduced to 6% by an amendment to N.Y.C.P.L.R. §5004.

*Great Cathay Development Corp.*, 43 App. Div. 2d 476, 352 N.Y.S.2d 483 (1st Dept. 1974); *Yamamoto* v. *Costello*, 73 Misc. 2d 592, 342 N.Y.S.2d 33 (Sup. Ct., Nassau Co., 1973); see *Kaufman* v. *Chase Manhattan Bank*, 370 F.Supp. 279 (S.D.N.Y. 1974); 5 Weinstein, Korn & Miller, New York Civil Practice ¶5004.01 (1973). These cases support, and we affirm, the district court's method of computation of pre-judgment interest. We include in our remand, however, instructions to recompute pre-judgment interest pursuant to the same method but based on the modified judgment for damages in amount of $25,793,365.

CCI appeals from the district court's refusal to award it consequential damages for the interest expense or carrying charges of more than $14,000,000 on the debt it incurred to finance its acquisition of Piper stock. CCI claims that it has been carrying a "locked-in" Piper investment since being reduced to a minority position.

We believe that the applicable rule for recovery of consequential damages here is that summarized in *Zeller* v. *Bogue Electric Manufacturing Corp.*, 476 F.2d 795, 803 (2 Cir.), *cert. denied*, 414 U.S. 908 (1973):

> "A plaintiff seeking consequential damages for fraud, at common law or under federal securities legislation, must establish the causal nexus with a good deal of certainty. Since consequential damages are an addition to or in lieu of what would ordinarily constitute a fair recovery, there is no room here for applying the liberal principles of Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931); and Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946), where some liberality



> is required to enable an injured plaintiff to recover anything." (footnote omitted).

CCI points to expert testimony which it says demonstrates that it was in fact "locked-in". This contention seems to us to have been undercut by the necessity for the experts to assume a sale of CCI's holdings in order to calculate the proceeds CCI would have realized. Absent any showing of an actual, albeit futile, attempt by CCI to sell its holdings, we find it difficult to find a "causal nexus" between its interest payments and BPC's violations "with a good deal of certainty." We affirm the district court's refusal to award such interest expense.

CCI also appeals from the district court's refusal to award it attorneys' fees. It argues that the public interest has been served by its commencing and prosecuting this action. True, awards of attorneys' fees have been recognized as an incentive to the private enforcement of the federal securities laws for the benefit of the investing public. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Wechsler* v. *Southeastern Properties, Inc.*, 506 F.2d 631, 635 (2 Cir. 1974). Undoubtedly CCI has promoted the public interest in the enforcement of the securities laws by prosecuting this action, but no more so than any private litigant furthers the public interest in suing to enforce rights conferred by statute. Moreover, pursuant to the mandate of our decision today remanding with instructions to enter a modified judgment for damages plus pre-judgment interest thereon, CCI will have recovered a substantial sum out of which it can pay its attorneys' fees and expenses in accordance with the traditional practice. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (2 Cir. 1973). We hold that, since the award of attorneys' fees in a case such as this one lies within the sound discretion of the district court, *Alpine*

*Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2 Cir.), *cert. denied*, 414 U.S. 1092 (1973), and we find no abuse of that discretion, we affirm the district court's refusal to award attorneys' fees.

## IV. Equitable Relief

Finally, we come to the injunctive relief fashioned by the district court on remand. For the reasons below, we affirm that portion of the judgment.

In addition to directing that damages be awarded to CCI to compensate it for the injury caused by defendants' violations of the securities laws, we ordered that an injunctive provision be included in the judgment which would deny BPC "the fruits of obtaining Piper shares illegally." Specifically, we directed

> "that the district court include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer." 480 F.2d at 380 (footnote omitted).

This contemplated that 231,002 shares, or approximately 14% of the outstanding Piper shares, would be barred from voting. Thus, BPC would be able to vote only 37% instead of 51% of the outstanding Piper shares, while CCI could vote its 42% block. Counting only the shares eligible to vote (1,413,788), this would give BPC 43% of such shares, CCI 49% and the public 8%. CCI in effect would have control through its plurality.

On remand, the court included in the judgment essentially the following injunctive provisions, to remain in effect for a period of 5 years from November 25, 1974, the date the judgment was entered (384 F.Supp. at 528-29):



(1) BPC was enjoined from voting the 231,002 shares.

(2) Such shares, however, would be considered authorized and outstanding for all purposes under Pennsylvania law and under the judgment.

(3) The enjoined shares were not to be counted for the purpose of determining a quorum at stockholders' meetings.

(4) All changes made in Piper's by-laws and the size of its board of directors since September 4, 1969 were to be rescinded; the by-laws, the size of the board and Piper's corporate charter were to remain as they existed on September 4, unless otherwise agreed by both CCI and BPC or ordered by the court.

(5) No increase or decrease in Piper's outstanding voting securities, and no merger, dissolution or liquidation of Piper, could take place without court approval.

(6) BPC was to implement provision (4) by calling a stockholders' meeting within 90 days.

(7) The court retained jurisdiction during the pendency of the injunction to modify it if a change in circumstances warranted.

The court's rationale for the injunctive provisions is outlined generally in its opinion, 384 F.Supp. at 523-26, and is set forth in more detail in its memorandum filed November 22, 1974 on the settlement of the judgment. In its memorandum, the court indicated that its objective in providing injunctive relief was to recognize BPC's 51% ownership of the enterprise regardless of its voting rights and to assure that the corporate assets in which BPC holds a 51% interest would not be "merged, liquidated or

distributed" without its consent during the period of the injunction.

CCI claims that the injunction gives BPC de facto control over Piper contrary to the mandate of our prior decision.[26] In urging that the injunction perpetuates BPC's dominance over Piper despite the fact that CCI now owns a majority of the shares entitled to vote,[27] CCI points to the following consequences of the injunction.

First, by virtue of Piper's cumulative voting system, the board of directors will be deadlocked, with BPC and CCI each electing four directors.[28] Second, a stalemated board will not be able to change the appointments of key Piper officials presently in office as a result of BPC's past control. Third, because BPC's shares remain authorized and outstanding for all purposes under Pennsylvania law and under the judgment, BPC can effectively block any major corporate action by failing to vote for it, since CCI cannot obtain a majority of the outstanding shares even with the support of all of the publicly held shares. Finally, with BPC assured of complete control when the injunction expires in 1979, Piper's executives will remain responsive to the wishes of BPC rather than to those of CCI in the interim. CCI urges that all restraints imposed on it by the injunction be removed except for a prohibition against merging Piper into CCI or an affiliate.

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26 The SEC as amicus curiae supports CCI's position in this respect.

27 Since our prior decision in *Chris-Craft II*, both CCI and BPC have purchased additional Piper stock. They now own 708,300 and 857,921 shares, respectively. Sterilization of 231,002 shares owned by BPC now gives CCI not merely a plurality but a majority (50.1%) of the outstanding shares eligible to vote.

28 Under Piper's cumulative voting system for its eight-man board, CCI and BPC can elect four and three directors, respectively, no matter how many of the publicly held shares are voted. To elect a fourth director, BPC needs only 1,432 additional votes from the public shareholders—less than 2% of the publicly held shares.



After careful consideration of CCI's objections to the injunction, we are not persuaded that the district court abused its discretion in fashioning equitable relief to implement our mandate. See, e.g., *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-01 (1973) (plurality opinion of Chief Justice Burger); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); cf. *SEC* v. *Management Dynamics, Inc.*, —— F.2d ——, —— (2 Cir. 1975), slip op. 2331, 2342-44 (March 18, 1975); *SEC* v. *Shapiro*, 494 F.2d 1301, 1308 (2 Cir. 1974); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100-03 (2 Cir. 1972). Although we recognize the force of CCI's objections—especially that the board is essentially stalemated—we believe that, considering the substantial investments of both CCI and BPC in Piper, their own financial interests will motivate them of necessity to cooperate in the management of the corporation and in the hiring of its top personnel, as the record indicates they apparently have done to some extent to date. The injunction does implement our mandate by barring BPC from compelling a merger for a period of five years.

If we were to remove all of the restraints imposed on CCI by the injunction as CCI proposes, the effect would be to grant to CCI for a period of five years the very control which it sought but could not prove it would have gained absent defendants' violations of the securities laws.[29] It is true that our prior opinion directed the minimum injunctive relief to be provided. We stated that we did not intend "to foreclose the district court from fashioning such additional appropriate relief as it may find necessary to implement our decision . . . ." 480 F.2d at 380. And our direction that the injunction should bar

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29 Our decision today, in remanding with instructions to enter a modified judgment for damages, is intended properly to compensate CCI for the injury it sustained as the result of defendants' unlawfully depriving it of a fair opportunity to obtain control of Piper.

BPC from voting its ill-gotten Piper shares "for a period of at least 5 years", *id.*, certainly implied that the district court could order the bar for more than 5 years. Under all the circumstances, however, we hold that the district court did not abuse its discretion in fashioning the injunctive relief that it did or in declining to grant more.

We have not overlooked the effect of the injunctive relief granted upon the remaining public shareholders of Piper—some 1400 persons holding 78,569 shares. The SEC as amicus curiae understandably has expressed special concern for these shareholders. It proposes, instead of merely sterilizing BPC's 231,002 illegally acquired shares, that they be treated as though held in a voting trust and during the period of the injunction that BPC be required to vote the shares in proportion to and in the manner that the publicly held shares are voted. We appreciate the SEC's characteristically helpful and innovative suggestion, and we have considered it with care. We have concluded, however, as the SEC itself candidly recognizes, that its proposal would reopen unnecessarily the battle for control, 480 F.2d at 379, at least for the life of the voting trust. Under all the circumstances, and especially against the background of six years of litigation to date, we think that result should be avoided.

We affirm that portion of the judgment that granted injunctive relief.[30]

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30 The cross-appeal by BPC, First Boston, the Piper family defendants and others may be disposed of summarily.

To the extent they claim that no damages at all should be awarded to CCI, the claim is rejected for the reasons set forth above in this opinion.

To the extent they claim that our previous decision in *Chris-Craft II* was erroneous with respect to the issues of standing, liability and causation, we reject such claims as frivolous. Aside from the original panel decision of this Court on March 16, 1973, 480 F.2d 341, which rejected these precise claims, the panel unanimously denied the cross-appellants' petition for rehearing (after amending the opinion as stated above, note 7 *supra*), 480 F.2d at 407; the cross-appellants' petition for rehearing en banc was denied, no judge having requested an en banc poll, 480 F.2d at 407; and the Supreme Court denied certiorari without dissent, 414 U.S. 910 (1973).

We rest on our previous opinion because it represents the law of the case, *Zdanok* v. *Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944, 950-53 (2 Cir.), *cert. denied*, 377 U.S. 934 (1964); because we find no conflict between *Chris-Craft II* and our intervening decisions of *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306 n. 98 (2 Cir. 1973) (en banc), and *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 n. 17, 1301 n. 20 (2 Cir. 1973), cited by cross-appellants; and because we are satisfied with it. *United States* v. *Certain Property, Etc.*, 344 F.2d 142, 144 (2 Cir. 1965).



SUMMARY

The following is a summary of our essential holdings:

(1) We reverse and vacate the district court's determination of damages due to CCI and we remand with instructions to enter a modified judgment in amount of $25,793,365, plus pre-judgment interest thereon, since the correct measure of damages due to CCI is the difference between the price it paid for its Piper stock and the price it could have obtained for it through a public offering after BPC unlawfully acquired a majority shareholder position.

(2) We affirm the district court's holding that CCI is entitled to pre-judgment interest on the damages awarded.

(3) We affirm the district court's holding refusing to award to CCI its interest expense on the debt incurred to finance its acquisition of Piper stock.

(4) We affirm the district court's holding refusing to award to CCI attorneys' fees.

(5) We affirm the district court's grant of injunctive relief as within its discretion in implementing the mandate of our prior decision.

(6) On the cross-appeal by BPC, First Boston, the Piper defendants and others, we find the claims of error to be wholly without merit.

(7) We order that costs be taxed in favor of CCI on its appeal and in favor of CCI on the cross-appeal.

Affirmed in part; reversed and vacated in part; and remanded with instructions.



## District Court Opinion on Relief

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*

v.

PIPER AIRCRAFT CORPORATION
*et al., Defendants.*

No. 69 Civ. 2227 (MP).

UNITED STATES DISTRICT COURT,
S. D. NEW YORK.
Nov. 6, 1974.

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, for plaintiff; Arthur L. Liman, Jack C. Auspitz, Anthony M. Radice, and Richard A. Miller, New York City, of counsel.

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, New York City, for defendants (Bangor Punta Corporation, David W. Wallace and Nicolas M. Salgo); James V. Ryan, C. Kenneth Shank, Jr., and Robert A. Kandel, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendant (The First Boston Corp.); J. F. Arning, C. W. Sullivan, and R. Urowsky, New York City, of counsel.

Chadbourne, Parke, Whiteside & Wolff, New York City, for defendants (Piper Aircraft Corporation, Howard Piper, Thomas F. Piper and William T. Piper, Jr.); Zachary Shimer, New York City, of counsel.

POLLACK, District Judge.

This case is on remand from the Court of Appeals to determine the quantum of compensatory damages due to Chris-Craft Industries, Inc. (CCI or CC herein) from the

defendants who were not dismissed from this suit and to include in the judgment an injunctive provision barring Bangor Punta Corporation (BPC or BP herein) from voting for a period of at least 5 years the Piper shares it obtained through purchases for cash and by an exchange offer which did not comply with the securities laws.[1]

Briefly, the Court of Appeals held herein that where a successful contender for control of a target corporation has attained part of its majority of the voting shares of the target corporation by purchases made in violation of the securities laws, the defeated contestant for control, although it neither purchased any securities from its competitor nor was deceived by any acts or statements of the latter, was entitled to sue the winner for damages as may be shown, measured by the reduction, if any, in the appraisal value of its shares of the target corporation when its opponent's position as a majority owner became established.

The right to sue and to claim such damages was accorded to encourage and implement the enforcement of the securities laws through private litigation and to deny to a securities law violator the fruits of obtaining shares of stock illegally, even though the unsuccessful contender was not induced by its competitor to enter the contest or to become a purchaser of the shares of the target corporation. The harm done to the defeated contestant according to the Court of Appeals is not that it had to pay more for the stock it bought but that it obtained less stock than it needed

[1] The original order of the Court of Appeals found defendants Paul L. Miller and Nicholas H. Bayard liable to CC. On rehearing, this determination was withdrawn and the Court of Appeals left it to the District Court to determine from the record whether, under the principles of liability regarding First Boston and its officers announced in the opinion on the appeal, either of said defendants was individually liable. The plaintiff then stipulated in the District Court that the complaint against them should be dismissed and it was so ordered.



for control—and this irrespective of whether it be shown that it could in fact have obtained control if there had been no interference with its opportunity.

Twice in the main opinion on appeal, it was clearly stated that, although there was an interference with CC's opportunity to obtain control, CC failed to establish that it could otherwise have succeeded in obtaining enough shares to give it control.[2]

> We agree with the district court's finding that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws by BPC and First Boston. 480 F.2d 341, at 373.
>
> We cannot say that CCI would have obtained a majority of Piper stock had BPC not violated the law, . . . 480 F.2d at 378-379.

The Court of Appeals pointed out that "the questions presented are of first impression", 480 F.2d 379, and as a moment's reflection will show, in ascertaining the damages called for, the appraisal mandated by the Court of Appeals requires the use of hypothetical figures and values. The parties constructed and theorized such figures and values from circumspectly selected data to supply their damage estimate contentions. Not surprisingly, each side

[2] The concurring opinion of Judge Mansfield points out that early in the control contest, CCI had run out of money and due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds, CC's chances of obtaining loan financing to pick up more of Piper's stock "were negligible" (p. 402) "In summary, having 'shot its bolt' in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer". 480 F.2d at 402.

charges the other's expert witnesses with internal factual inconsistencies. The Court, in a sense, agrees in the main with both parties.

The Court of Appeals set forth the damage issue for this Court as follows:

> The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. 480 F.2d at 380.

Controversy produced by the mandate has arisen in part from perplexity in grasping its concept and forging a rational method of application. The words used are capable of a variety of interpretations and shadings, as the parties have demonstrated in their respective briefs, and they have put this Court to the difficult choice between following the strict literal meaning of the words and the broader remedial intent evidenced by the general thrust of the appellate decision. The task of reconciling the often conflicting results stemming from each course, has in turn produced as many complexities as it has clarified. Additionally, the quantification of unliquidated damages is hardly an exact science; computation thereof is accomplished basically by estimation and inference. *See generally* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-265, 66 S.Ct. 574, 90 L.Ed. 652 (1946); Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894 at 898 (2d Cir. 1974); Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 (2d Cir. 1973) (damage computations "demand prodigies of prophecy and measurement beyond the capacity of jurors and perhaps of a judge").

The damage inquiry herein, naturally enough, called for expert testimony to assist in the evaluation of the manner



and extent to which CC had been damaged by the violations established. The parties took many months to prepare for the hearing on damages. The selection and preparation of their experts was obviously carefully orchestrated; indeed, it would be naive to assume that the experts were selected and proceeded without regard to the interests of the party who called them. Rather, the record clearly reflects that by and large the experts were result-oriented, a fact which tended to restrict their contribution to something less than a full view of the damage problem and to make their results fall short of meeting the full scope of the real questions to be decided.

As a general concept, both parties agree that CC's damages must be measured by comparing the value of its Piper holdings prior and subsequent to BP's acquisition of majority ownership. The disagreement surfaces, however, in the differing paths which the parties take in reaching a valuation.

Preliminarily, there is a deep dispute over the base from which the CC ownership is to be valued for the damage inquiry. BP suggests that no injury occurred until the moment immediately preceding its acquisition of majority ownership. CC, however, argues that its Piper stock should be valued as if CC was the owner of 41%, and BP owned 31% of Piper.[3]

Neither PP nor CC, however, have fully addressed the purpose of the mandate in their analysis of the inquiry before the Court. The Court of Appeals' determination that BP unlawfully purchased 14% of the Piper shares suggests that the 14% must be effectively "discarded" by

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[3] On August 7, 1969, BP owned 45% of Piper and CC owned 41%. BP had acquired 14% of its stock unlawfully; thus, discarding that 14%, CC would have "led" 41% to 31% on August 7.

BP; indeed, the injunction ordered by the Court of Appeals is aimed at effectively freezing the voting of that stock for a significant period. Without that 14%, BP would have owned but 37% on September 5, the date it gained a majority. CC, meanwhile, would have held at least 42%, the amount it in fact ended up with on that date. Since the inquiry here is to determine the damage suffered by CC *attributable to BP*, it is therefore appropriate to determine what the value of CC's block of stock *would have been worth* on September 5[4] *absent* BP's illegal conduct, i. e., if CC on that date had led in the contest 42% to 37%. In turn it must be determined how that value was affected by BP's taking a majority position and reducing CC to a minority position.

The methodology of that quantification is by no means simple. The Court of Appeals directed this Court to measure the "reduction" in the "appraisal value" of CC's Piper holdings attributable to BP's unlawful conduct. BP, therefore, insisting that the instructions must be literally followed, would have this Court consider BP's merger power and look only at whether there was any reduction in the appraisal value of the Piper stock in the context of a statutory appraisal proceeding, i. e., the amount that a Court would have awarded a Piper stockholder in a statutory appraisal proceeding on September 5, 1969.

CC, on the other hand, argues that BP's literal interpretation of the mandate and any use of the concepts of a statutory appraisal would render the Court of Appeals'

[4] Initially, the parties hotly contested the relevant date to be used for the valuation inquiry. CC initially contended that the Piper stock should be valued as of August 7, 1969. However, in its post-hearing memorandum, CC has abandoned that argument and has joined with BP in adopting the September 5 date for valuation purposes. The crucial question of the methodology to be used, however, remains unchanged.



decision nugatory. CC argues that BP's interpretation would erase any difference in the statutory appraisal value of the Piper shares measured on September 5 just prior and then subsequent to BP's gaining majority ownership.

CC's reading would jettison the measured phrasing of the Court of Appeals' mandate. It must be presumed that the talisman, "appraisal value", was chosen purposefully. The words so used must be viewed in the legal context in which they appear in the mandate. The Court of Appeals associated the reduction of the appraisal value to be found with BP's "being able to compel a merger at any time."[5]

If the word "appraisal" is to be considered in its more colloquial meaning, i. e. "to fix a price . . . as an official value" (Oxford English Dictionary, 3d Ed. 1965), the phrase "appraisal value" would be redundant. To be sure, the Pennsylvania appraisal statute eschews the term "appraisal value" in favor of the words "fair value"; nonetheless, the Pennsylvania cases, as well as the common legal usage in this Circuit and elsewhere, clearly acknowledge the significance of the term "appraisal value" (in the context of merger) as referring solely to statutory proceedings, *see* Lowry v. General Waterworks Corp., 26 Pa.D. & C.2d 154 (1963); Petition of Kreher, 379 Pa. 313, 108 A.2d 708 (1954). *See also* Miller v. Steinbach, 268 F.Supp. 255 (S.D.N.Y.1967) (applying Pennsylvania law). That CC could not have been forced by BP's voting power alone into such an appraisal proceeding while CC hypothetically held a five-percentage-point lead over BP is of no moment. For reasons best known to it, the Court of Appeals has directed this Court to determine the "appraisal value" of

[5] It is basic corporate law that statutory appraisal proceedings, when available, can be invoked by dissenters who object to mergers of the corporate enterprise. Such is the law of Pennsylvania, the law which applies herein. *See* 15 Pa.Stat.Ann. § 1908 (Purdon's, 1967).

CC's Piper holdings as if keyed to such a proceeding, viz., being able to compel a merger.

BP, however, has not convinced the Court with its argument that there was no "reduction" in the appraisal value of CC's Piper holdings. Other considerations could well come into play which might involve advantages from which CC was foreclosed.[6]

Prior to the time that BP gained majority ownership, CC clearly possessed at least the opportunity to itself gain control of Piper, and this opportunity was erased once BP emerged as the holder of a majority of the Piper shares on September 5. Thus, at the moment that CC was confined

[6] It is not at all clear that the Court of Appeals considered the effect of cumulative voting on Piper's even-man Board of Directors. In fact, when the Board stood at eight directors—as it did in September of 1969—BP, as a majority owner, was entiled to but four of the directors, CC three, and the public retained the balance of power. Possession of a mathematical majority of the outstanding shares gives the illusion that the majority will also be able to elect a majority of the directors. However, where, as here, there is cumulative voting and an even-numbered Board of Directors, it takes more than a bare majority to elect more than half of the Board. Thus, as the Piper Board stood in 1969, BP by no means instantaneously achieved the absolute power to compel a merger "at any time" when it obtained 51% of the Piper shares, since it was at that point assured of only half of the directorships and Board approval would have been necessary under Pennsylvania law for any merger plan. *See* 15 Pa.Stat. Ann. § 1902 (Purdon's 1967). To be sure, as plaintiff seems belatedly to have recognized, as a majority stockholder BP could have used its voting power at a stockholders' meeting to alter the by-laws and change the number of the Board of Directors, thereby gaining the mathematical opportunity to elect a majority of the Board. Such an effort in these circumstances would surely have been highly suspect and might well have raised thorny questions for litigation; in any case, the ability to so alter the Board hardly is akin to the Court of Appeals' determination that BP gained the power to force a merger "at any time". *Non constat*, for present purposes this Court will assume that BP did in fact acquire that merger power on September 5, 1969, heeding the oft-repeated rule that the District Court must follow the mandate of the Court of Appeals however erroneous the lower Court may deem that mandate to be. Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973).



to its minority ownership status, the "appraisal value" of its Piper shares was possibly reduced because of the removal of CC's opportunity to gain control of Piper and would have to be discounted to reflect the uncertainty of its position due to its dependence in some respects on BP's future conduct. CC contends that BP could be expected to choose the bottom of a business cycle to merge and force CC to seek its appraisal rights then under Pennsylvania law.[7]

Quantifying that reduction in present value, however, is well-nigh an impossible task. It is one thing to recognize in the abstract that there has been a "reduction", but quite another to assign a value to that concept. No one can guess when, or even if, BP would ever force CC to submit to or seek a statutory appraisal or predict in what presently unforeseeable way BP might legitimately turn control to its advantage and CC's disadvantage. Indeed, the injunction ordered by the Court of Appeals expressly obviates that possibility for at least five years. BP's "power" to compel a merger is, standing alone, too speculative to quantify. It is highly doubtful that the Court of Appeals intended that this Court should engage in such conjecture. The more logical inference is that this Court should on the basis of good sense as applied to the record reach an appraisal decision making the best estimate possible under the circumstances of what "reduction" in "appraisal value" occurred.

[7] It is unclear as a matter of practical finance whether BP would in fact choose such a time for merger. At the bottom of a business cycle and in a period of contraction, BP (and thus Piper) would clearly have limited resources or at least limited economic incentives to fund an appraisal award; CC's huge minority block, by any standard, would sport a heavy price tag to be borne by BP in such a proceeding. Moreover, as markets rise, the cash cost of satisfying an appraisal demand might well increase greatly without a corresponding increase in available cash to fund the payout, thus chilling any prospect of merger in such circumstances.

Thus, this Court must find a value for CC's Piper holdings both before and after BP gained majority ownership. Obviously, the objective components of that value, as recognized by the experts—such as asset value, and market value—remained unchanged in BP's gaining a majority. The relevant block for purposes of such an evaluation is merely an anonymous 100-share block, and each of the experts so proceeded. The "value" of such a block was not altered by BP's unlawful conduct. Consequently, the only issue for determination is what *premium* CC's block would have commanded that disappeared once BP took "control". CC is presently in a position no different from that of any minority owner (albeit a large one) of any publicly held corporation. Only that premium representing the value of CC's opportunity to gain control has been removed. Thus, it is the removal of that premium which represents the reduction in value of CC's Piper holdings attributable to BP's acquisition of majority ownership.

*The value of the plurality position*

The determination of the value of CC's hypothetical "lead" of 42% to 37% (and hence the value of CC's lost opportunity to gain control) must be preceded by an estimate of the fair market value of the Piper stock on September 5, 1969. For it is elementary that whatever premium CC's stock contained expressive of its lead position and its opportunity therewith to gain control must be added to the fair market value of its holding in Piper stock on that date.[8]

[8] The amounts paid by the contestants in the midst of the battle are by no means the sole or even a fair indication of the premium relevant herein. The conduct of contestants in such battles is often marked by "irrationality" (Tr. 500-24); no expert testified that the Piper investment was worth anything approaching the $80 per share paid by the parties. The amounts paid were clearly wildly and artificially inflated due to the emotional, as well as actual, struggle of the parties. Such amounts, therefore, must be discarded for purposes of determining *fair* market value.



Once the fair market value is determined, the value of CC's opportunity to gain control can be evaluated by determining the value of actual possession of control of Piper to CC. That value will be a figure that must be discounted by the factors of probability of success, time, and the economic benefit of that control to CC's holdings.

*I. Fair Market Value*

The "fair market value" of Piper which must be determined is that market value of Piper uninfluenced by the fight for control.[9]

Each of the experts attempted to formulate the fair market value of the Piper stock as of September 5. Their somewhat surprisingly narrow range of disagreement highlights the relative acceptability and uniformity of their techniques and methodologies with respect to estimating a fair market value.[10]

[9] This does not mean that Piper's so-called attractiveness as a "conglomerate target" (alluded to by Prof. Roger Murray, one of the plaintiff's experts, and adopted extemporaneously on the witness stand by another of plaintiff's experts, Robert Rosenkranz) should be ignored. The "fair market value" does no more than remove the distorted, artifically inflated prices that were being paid by the contestants. To the extent that Piper, standing alone, held any "attractiveness" as a target, that "attractiveness" would be represented in its fair market value notwithstanding the presence or absence of a hotly contested fight for control.

[10] At the first trial, plaintiff's expert was Dr. Douglas Bellemore, a Professor at a graduate school of Business Administration. Bellemore never addressed the question of fair market value in his testimony; moreover, what theories he did utilize were, together with their results, wholly out of line with all of the other experts produced by both parties. Indeed, this Court's earlier characterization of Bellemore's testimony as "unsubstantiated and cursory" (337 F.Supp. 1128, at 1153, n. 11) seems now to have been adopted *sub silentio* by his proponent, the plaintiff, which has now abandoned any reliance on the Bellemore testimony. For practical purposes, the Bellemore testimony can be discarded for this inquiry.

The relevant testimony as to "fair market value" can be summarized as follows:

Dr. Sigmund Wahrsager, testifying for CC, determined that the fair market value of the Piper shares on September 5, 1969 would have been $52 per share. Wahrsager is a partner in the Wall Street firm of Bear, Stearns & Co. responsible for the activities of the corporate finance department, which deals with public offerings, private placements, mergers and acquisitions, tenders and evaluation of securities. Wahrsager's testimony as to fair market value reflected utilization of the same technique used by all the experts, *viz.*, to apply a selected price-earnings multiple to Piper's earnings during the period considered. Such a computation has long been recognized as an accepted technique in determining fair market value. *See, e. g.*, Morris v. Burchard, 373 F.Supp. 373 (S.D.N.Y.1974); Vandervelde v. Put and Call Brokers, 344 F.Supp. 118, 150–151 (S.D.N.Y. 1972). *See generally* Dewing, The Financial Policy of Corporations 390-391 (5th Ed. 1953).

Professor Roger Murray, a professor of finance at Columbia University's Business School with a long list of financial credits, another of CC's experts, was somewhat more oblique in his approach. His "fair market value" computation reflected a built-in premium value for CC's lead position. However, stripped of its semantics, Murray concluded that the Piper stock, absent the control fight, would have been valued at $36.75 per share—by far the lowest figure offered by any of the experts.

Plaintiff's remaining expert, Robert Rosenkranz, carrying responsibilties in the corporate finance area, had introduced the Chris-Craft account to his firm, Messrs. Oppenheimer & Co., after the events complained of herein.

The firm became financial adviser to CC in connection with a recapitalization plan. His and their interest are to



be considered in evaluating his testimony. Rosenkranz testified that the Piper stock had a fair market value of $58 in September of 1969.[11]

At the initial trial, defendant's sole expert was Clifford Fitzgerald, vice-president and head of the Corporate Finance Department of Drexel Firestone, Inc. He testified extensively on the subject of the fair market value, the value of control, its elements, how to estimate a premium for control, and the appraisal value of Piper stock. In this Court's earlier opinion, Fitzgerald's testimony was characterized as "careful and well-documented" and "persuasive in the main". 337 F.Supp. at 1153, n. 11. Fitzgerald had testified at that trial that the Piper stock's fair market value was $42.10 per share on September 5, 1969 and he explained in detail how this was arrived at. Each of the experts at the post-trial hearing on damages referred particularly to Fitzgerald's testimony, attempting to harmonize or compare their conclusions with Fitzgerald's. Their reliance on the Fitzgerald analysis in ascertaining fair market value—which utilized the same basic formula of earnings multiplied by an appropriate capitalization rate —reinforces this Court's previous impression of the reliability of Fitzgerald's conclusions.

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[11] In addition, plaintiff on rebuttal produced an unscheduled witness, Mr. Steven Ross, Chairman of Warner Communications, Inc. Ross was presented as a man with business experience in corporate acquisitions, and thus qualified as an "expert" to testify at the hearing. No prior notice was given to defendants of Ross' appearance, despite some months of preparation for expert testimony and agreement between the parties to disclose to each other the identity and opinions of all experts to be used. Ross is a long-time client of plaintiff's counsel in the field of corporate acquisitions and thus his availability must have been known and anticipated for some time. Ross's testimony was confined to the area of his alleged "expertise"; he voiced no opinion as to the value, fair or otherwise, of Piper other than to announce his faith in Nicolas Salgo's (the Chairman of Bangor Punta) judgment.

At the post-trial hearing on damages, defendants presented the record of the Fitzgerald testimony and two additional expert witnesses. The first, Aubrey Lank, is a Delaware lawyer with experience as a Court-appointed appraiser, expert witness and attorney in statutory appraisal proceedings under Delaware law. Lank quantified defendants' statutory appraisal theory of damages. He also computed Piper's fair market value in September 1969 as one element of the appraisal process; his analysis resulted in a fair market value of $52.50 per share and an appraisal value of $49.46.

Defendants' second hearing expert was Donald Gant, a partner of Goldman, Sachs & Co., whose function for 20 years has been to give advice in corporate financing, to carry out public underwritings, private financings, mergers and acquisitions and to do evaluations of securities. While Gant's preparation for the hearing was concentrated on the price CC would have realized from a public distribution of its Piper stock, he also computed the fair market value of the Piper stock on the relevant date at between $44 and $46 per share. Gant's oral testimony further reflected the pragmatic business realities facing a contestant engaged in the titanic struggle portrayed in this case; his analysis utilized realistic financial appraisals rather than abstract academic or statistical notions.

Thus, the figures on fair market value ranged from Murray's strikingly low estimate of $36.75 to Rosenkranz's $58 per share—a spread of some $20 per share. Ignoring the two extremes, however, the spread is reduced considerably, i.e., to $10 per share (from Fitzgerald's $42.10 to Lank's $52.50).

Selecting the appropriate figure involves, obviously, a certain amount of balancing and estimation. As noted, all the experts followed the pattern of reconstructing what



each considered to be the appropriate earnings figure for Piper and then applying a "multiplier" to represent the price/earnings ratio. To derive the proper factor, some experts utilized information relative to Piper's competitors, Cessna and Beech; others gave more weight to the Standard & Poor's general average; and still others relied mainly on Piper's own past performance. Thereafter, each expert took a separate route to his ultimate figure.

Choosing one expert's figure over another on this issue would be to reject one accepted technique while accepting the other. The more prudent course would simply be to average all the computations, an approach advocated by defendants in their post-trial memorandum. *See also* Note, Developments in the Law-Damages, 61 Harv.L.Rev. 113, 125 (1947). Averaging all the experts yields a fair market value figure of $47.73; discarding the highest and lowest figures and averaging the rest results in a value of $47.90. Thus, under all the facts and circumstances, a round figure of $48. per share seems a reasonable and justifiable estimate of the fair market value per share of Piper stock as of September 5, 1969.

*II. The Value of Chris-Craft's Opportunity to Gain Control*

Quantifying the premium, if any, representing the value of CC's opportunity to gain control of Piper while holding a hypothetical 42% to 37% "lead" entails, of necessity, a determination of the value of ultimate control of Piper to CC.

"The phenomenon of 'control' is perhaps the most important single fact in the American corporate System." Berle, " 'Control' in Corporate Law", 58 Columbia L.Rev. 1212 (1958). Control has been referred to by one commentator as "the complexus of duties and rights possessed

by the custodian of another's goods." Bayne, "A Philosophy of Corporate Control", 112 U.Pa.L.Rev. 22, 29 (1963). The law has never "advertently" defined control in a manner that allows one to reduce it to a money value. (Ibid.) The securities laws refer redundantly to the power to exercise a controlling influence. Despite the amorphous intangible nature of "control", both parties have argued their positions as if they are assuming that "control" is *ipso facto* a valuable personal asset that can be bought and—more importantly—sold or otherwise converted into actual financial gain by its "owner". The control position, however, cannot be viewed so narrowly.

To be sure, private parties have long paid substantial premiums for control positions, and each of the experts who testified before the Court so acknowledged.[12] However, the "value" of having control is not necessarily the price paid in excess of the fair market value of the stock purchased. Control represents different values to different holders. The value of control is, if nothing else, subjective; indeed, "[c]ontrol may be sought for a combination of reasons, some of them so subjective that the buyers may themselves be uncertain regarding their basic intentions." Hill, "The Sale of Controlling Shares", 70 Harv.L.Rev. 986, 1010 (1957). Plaintiff's witness Steven Ross added a literary touch by saying "control gives power over your own destiny" (Tr. 612); but the *value* of this "power" still lies in the realm of subjective judgment (Tr. 631). Perhaps most importantly, the value of control varies with the purposes to which control will be put. *See generally* Bayne, "The Investment Value of Control Stock", 54 Minn.L.Rev. 1265 (1970). Examples of this differing subjective value of

[12] "[A] controlling block of stock has greater sale value than a small lot." Perlman v. Feldmann, 219 F.2d 173, 180 (2d Cir. 1955) (Swan, J., dissenting).



control are easily imagined. Thus, for instance, control of a motor company might be worth far more to another motor company than it would be to a large bank; a motor company might be able immediately to integrate the "target's" operations, and apply its own marketing and management expertise to its acquisition. The bank, on the other hand, would have to expend further substantial sums in acquiring this expertise—either from inside the company or from without—and thus make a much larger investment in the motor company to be acquired. The larger the cost of the investment necessary, assuming a constant return under optimum conditions, the smaller the percentage of that return on the investment, and hence the lower the value of control.

Control, furthermore, has a variety of other measurable values, ranging from the crucially important to the banally mundane. Thus, for example, control carries with it the ability to appoint officials and dictate managerial policy. *See, e. g.*, McClure v. Law, 161 N.Y. 78, 55 N.E. 388 (1899); Honigman v. Green Giant Co., 309 F.2d 667 (8th Cir. 1962). Other advantages of control include the opportunity to liquidate the company, to secure a capital gain, arrange mergers (as recognized in the instant case by the Court of Appeals) and consolidations advantageous to the controlling persons' outside interests, to cut or eliminate dividends to avoid personal income taxes, to grant stock options, and the like. Bayne, "A Philosophy of Corporate Control", 112 U.Pa.L.Rev. 22, 52, n. 103 (1963). In short:

> The corporate assets at control's disposal for the performance of managerial duties range from the portant policies of purchase and sale, of initiation of picayune perquisites of the office—yachts, clubs, secretaries, and chauffeurs—to the determination of imlitigation and declaration of dividends. *Id.* at 49.

Defendant's expert Fitzgerald, testifying at the initial trial, accurately surveyed the elements in valuing control, noting that the holder could derive the benefits of equity financial reporting, the ability to direct the business and its policies, the ability to merge or sell assets, declare dividends, sell stock, obtain counter-seasonal or counter-cyclical effects and the prospects of an enhancement in a price/earnings ratio of the acquirer. (Trial Tr. 1536-42.)[13]

But it is equally clear that the controlling person may not baldly misappropriate this power for his own interests at the expense of the corporation; his primary responsibility is to the corporation itself, for the controlling party is merely a custodian of the powers of his office. *Cf.* Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914); Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 A. 77 (1910).[14] And unless that custodian can somehow convert that control, and thus enhance the value of his investment through utilization of the control position, that position is—standing alone—not worth any premium. *See* Bayne, "The Investment Value of Control Stock", 54 Minn.L.Rev. 1265, 1281-88 (1970).

In the case presently before the Court, it is not at all clear that CC entered the contest to gain control of Piper and it is even less apparent that CC could have enhanced its investment by gaining control. The timing of CC's entrance into the marketplace in search of Piper stock,

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[13] To be sure Fitzgerald concluded that none of these elements gave any added value to the control position in this particular case, *see infra* pp. 43-4.

[14] "The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors." Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-488, 39 S.Ct. 533, 535, 63 L.Ed. 1099 (1919). *See also* Berle "'Control' in Corporate Law", 58 Columbia L.Rev. 1212, 1222-4 (1958).



as well as the other evidence adduced both at the initial trial and on the hearing on damages strongly suggest that CC desired and speculated for only a profitable take-out of its Piper investment. Its commitment to seeking long term investment in and control of Piper came later, under compulsion.

Thus, for example, CC's January tender offer was for only 300,000 shares, at a time when it was manifest that CC needed approximately 500,000 shares for control of Piper. CC's former Vice President, C. Leonard Gordon, stated at the initial trial that CC did not want to give the impression that it was committing itself to acquire a majority of the stock because it was not in fact committing itself; that its intention in making this limited tender offer was precisely "to be in a position to sell", "if we could see it was advantageous to get out or necessary to do so"; CC had not arranged for financing necessary to go for control. CC's "Schedule 13", filed with the Securities and Exchange Commission in compliance with the terms of the Williams Act regulating tender offers, 15 U.S.C. § 78n(d-f), while stating that CC was seeking to acquire the Piper shares with a "view" towards control of Piper—used language calculated to leave CC with the option of selling out, according to Gordon (Trial Tr. 372).[15]

More generally, CC's President Herbert Siegel who initiated the Piper purchases frankly acknowledged his unfamiliarity with the aviation business, while insisting

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[15] Indeed, CC even sought a buy-out from BP of CC's Piper shares through the medium of BP's own tender offer. (Trial Tr. 398). However, such a tender would have placed CC afoul of the statutory prohibitions against "short-swing" purchases and sales, 15 U.S.C. § 78p(b), and BP refused to extend the time of its tender offer to remove that obstacle from CC's path. Gordon stated that CC would have tendered the shares to BP if BP had extended the offering time to accommodate CC's problem. (Trial Tr. 398, 421).

that Piper would complement CC's business (Trial Tr. 512-514). Siegel's own personal history of numerous tenders and aborted bids for other corporations failed to demonstrate any long-term interest in his targets except on one occasion—the acquisition of CC itself. Piper was the only situation in the last several years when Siegel did not sell out after strong purchasing took place and before taking a permanent stance in the target (Trial Tr. 522). The foregoing circumstances bear significantly on the value of ultimate control of Piper to CC.

The value of control to CC was directly related to "the totality of the abilities the new man brings to the firm." Bayne, "The Investment Value of Control Stock" 54 Minn. L.Rev. 1265, 1282 (1970). There has been no showing that the Chris-Craft regime could have in any way altered or improved the Piper picture. If anything, the major value of the control position to CC appeared to be solely as a fulcrum for later sale. To be sure, ultimate control of Piper could well have resulted in various forms of improvement of CC's balance sheet, but such amorphous enhancements are incapable of reasonable valuation. Furthermore, to the extent that CC sought control of Piper for the purpose of being able to integrate the Piper earnings with the CC earnings, that result was accomplished even absent control by an accounting methods change in 1970 which permitted such accounting. (Trial Tr. 1538). Thus, in the long run, CC lost nothing in this regard when it lost the fight for a majority of the stock.

It is significant as well to note that the Piper family and management were, to say the least, staunchly opposed to the CC "invasion". Had CC achieved ultimate control, therefore, the prize would have embraced resistant and difficult personalities and CC would have been forced to undertake a wholesale—and expensive—replacement and reorganization of the Piper corporate management structure. A formidable task by any standard, such a course



would have been especially doubtful in light of CC's acknowledged attraction to the Piper name and reputation. (Trial Tr. 513). At all events, such a significant future financial and psychological expense is a substantial discount factor to be applied to the ultimate value of control of Piper to CC.

In light of the inability to affix a value to CC's unsuccessful quest for control of Piper (and hence a value to CC for its opportunity to gain that control), the only accurate way of measuring the value of CC's lead position is to determine what CC's position on September 5 was worth to a hypothetical reasonable purchaser.[16]

But even if CC could have realized the full value of its "plurality position" by a sale, it is not at all clear that the premium, if any, realized thereby could be properly retained by CC. In the atmosphere of recently decided cases, especially where a vocal opposition exists, the exercise of control is bound to be seriously hedged by restrictions protective of minority interests. *Cf.* Perlman v. Feldmann, 219 F.2d 173 (2d Cir. 1955). *See also* Porter v. Healy, 244 Pa. 427, 91 A. 428 (1914). *But see* Essex Universal v. Yates, 305 F.2d 572 (2d Cir. 1962). It is clear here that the excess amounts paid by both CC and BP in August of 1969 were, in effect, "anticipation" premiums; the contestants, in other words, were paying prices with an inflation factor that hopefully, in the end, would be repayed by the traditional "control" emoluments to the victorious bidder. However, between realization of control and the realization of repayment of the premium paid for control are many hazards. Certainly, these factors affect not only what uses control can be put to but also the market value of the control and any attempt to sell it. A contestant who, in the words of expert Wahrsager, allegedly had a

[16] CC correctly points out that the actual *existence* of such a purchaser is immaterial: rather, the "purchaser" must be constructed to determine what value, if any, is *to be ascribed to* CC's lead position on September 5.

"99% chance of gaining control" if it led by 42-37 (Tr. 30) could not, under equitable concepts, sell his plurality position without accountability if the sale of such a position was to deliver control or use it to benefit himself at the minority's expense.

For present purposes it is enough to note that while the "hypothetical purchaser" method is the only way of determining the value of CC's plurality position before BP acquired 51%, such a method raises substantial questions as to whether the existence of the plurality would have added materially to the per share fair market value at the time—absent the plurality.[17]

Similarly, a number of other factors tend to reduce the "premium" that CC might have expected to realize. CC's hypothetical lead cannot be viewed in a vacuum; its opponent, BP, had exhibited extraordinary tenacity, and quite clearly had committed itself to use any and every resource available to win the contest. Furthermore, BP's energies were fully focused towards control of Piper, for it had contractually committed itself to the Piper family to use its "best efforts" to obtain control. It is thus doubtful that BP would have "dropped out" of the fight, even faced with a five-point deficit.[18] The likelihood of any third-party expending enormous sums of cash to take over CC's plurality position just for the privilege of continuing the dogfight with BP is unrealistic and slim at best; defendants' expert

[17] It goes without saying that any sale of CC's plurality position in August or September, furthermore, would have exposed CC to the pitfalls of the short-swing statutes that it so desperately sought to avoid. 15 U.S.C. § 78p(b); Securities Exchange Act, § 16(b). Thus CC was between the Scylla of § 16(b) and the Charybdis of equitable limitations on the sale or use of control.

[18] It should be remembered that BP entered the contest with CC, in effect, holding a 33 percentage-point lead. The expert testimony as to the "statistical probability" of the leader going on to victory is sufficiently doubtful as a matter of business experience and common sense in a situation where there is a bidder with greater resources at his command.



Mr. Gant, in particular, pointed out that unlikelihood in his testimony (Tr. 503).

Furthermore, CC's opponent was not merely BP—it was Piper itself. The Piper family and management had long since displayed its adament opposition to any takeover by CC. The value of having management on BP's side cannot be minimized, and that is a value that BP alone possessed. Moreover, the "winner" of the contest, whoever it might be, knew full well that it would be faced with a large and highly vocal minority opposition—hardly the ideal corporate situation to maximize the potentialities of control. It goes without saying that whatever majority control is worth where the balance of the ownership is scattered and uncoordinated, a majority position is worth less to a third party where a large minority holding exists. This is particularly so where, as here, the rival interests have displayed a willingness to litigate every issue and there is the capacity to force a costly appraisal proceeding to forestall or hamper the exercise of control.

In short, even assuming *arguendo* that CC's "lead" position possessed a value that was personal to CC and did not already belong to Piper, as in the *Perlman* case, the value of that position could be substantially less than the value of the opportunity to gain control in more normal circumstances. The control fight still raged; CC, even with a lead of 42-37, could not be sure of the outcome and the value of control to a third party if it was indeed achieved was, in any case, questionable. The premium value of CC's hypothetical lead was depreciated accordingly.

### *III. Quantifying the Premium*

There was widespread disagreement among the experts as to the dollar value of CC's plurality position.[19] Mr. Wahrsager testified that the ultimate value of control of CC would

[19] All agreed, however, that the premium given either a 41-31 or 42-37 lead would be identical.

lift the value of CC's plurality position by 40% above the fair market value, to $72 per share; that figure, he testified, represented what he thought a third-party would have paid for the lead position. (Tr. 9, 32, 62a). Thus, Wahrsager valued the plurality premium at approximately $20 per share, the difference between what he considered to be the fair market value of $52 per share, and the value of CC's plurality position of $72 per share. The economic climate at the time seems not to have influenced Wahrsager's estimations of value. He testified that in September 1969 a pronounced downward market movement started to become manifest until a real collapse in security prices occurred in the summer of 1970. He did not foresee this decline, his statistical studies did not tell him it was coming and he did not take this deterioration into consideration in his valuations. Furthermore, his $20 figure can be taken as little more than an abstract creation. No one had told Wahrsager what value enhancement CC could derive from its control venture nor did he have any objective basis for estimating dollar-wise what benefit CC could reasonably have expected from being in a position to manage Piper and its dividend policies.

The Court has searched vainly in the record for specific identification of the advantages of control to CC reducible to money value.

Professor Murray's calculation, like his fair market value computation, was somewhat more obscure; he persistently eschewed assigning any premium to CC for its plurality position until a leading question finally evoked his acquiesence that such a premium could be as much as 40% over the fair market value (Tr. 167-8). Murray stated that the contestants for control undoubtedly felt that under their management respectively they could make changes in the hope to enhance Piper's earning power. But he did not



attempt to identify any of the changes or evaluate them or put any dollar figures on them. He said that there was no way that he could read the minds of the decision makers to figure out what their expectations might be.

Mr. Rosenkranz likewise refrained from assigning any premium to CC's block; he said, "It was not part of our assignment to try to assign a premium based on the hypothesis that Chris-Craft had a plurality of the Piper shares." And while his testimony vacillated, Rosenkranz explicitly stated at several points that he would place *no* premium on the lead position because of the ongoing uncertainty of victory even when CC held 41% of the Piper stock despite the prognostications of plaintiff's statisticians to the contrary. (Tr. 267, 306). To be sure, Rosenkranz at times did acknowledge that a lead position could bring some premium (Tr. 228, 309, 320), but nowhere in his testimony did he attempt to assign a premium representing that factor (Tr. 309). It was Mr. Rosenkranz' testimony that the power to choose management cannot be quantified and that there is no way of evaluating the possibility of increasing earnings in the future so as to determine enhancement in value inuring from the acquisition of control (Tr. 331, 332). Thus, to Mr. Rosenkranz the "value" of CC's plurality position was simply $58 per share (Tr. 306, 320).

At the initial trial, defendants' expert Mr. Fitzgerald fully and accurately analyzed the various components entering into the assignment of a control premium, and concluded that had CC gained a majority of the Piper stock, he would still assign no premium to its position; in his words, a control premium "would not seem to be justified or warranted", (Trial Tr. 1536) since the sole measurable value of control herein would be the utilization of the equity accounting method, and such method became available to holders of 20% or more of a company's stock. *See supra*

pg. 519. Despite repeated cross-examination on the subject, Fitzgerald continued to insist that no premium was warranted, no matter which contestant ultimately gained majority ownership:

> Q: As you sit here on this witness stand as an investment banker, can you tell me whether in your opinion a reasonable buyer would be willing today to pay as much per share for Chris-Craft's 42 per cent of Piper as for Bangor Punta's 51 per cent?
>
> A: That is our testimony and that is what I am saying here sitting in this witness box. (Trial Tr. 1585).

Fitzgerald realistically noted that control in the context of the CC—BP battle would be worth very little:

> [I]t is our view that in any situation that would be litigious or hostile it would be very difficult to exercise control and to make reasonable business gambles, as would be the case when you were not being constantly second guessed. (Trial Tr. 1539).

Accordingly, Fitzgerald concluded that there would be no premium attached to the ultimate control position of Piper.

Mr. Gant, testifying for defendants at the post trial hearing, stated that CC could readily dispose of its Piper shares only by way of a public offering in which it could be expected to realize $43 per share. Obviously, any premium value would be dissipated in such a public offering (Tr. 431). Nonetheless, as was the case with Fitzgerald, Gant perceptively and persuasively analyzed the components of that plurality premium; he testified that a party seeking control of Piper *where there was no concentrated opposition* would possibly pay a 20% premium (Tr. 520-1)—half



the figure named by Wahrsager and Murray. However, Gant, like Fitzgerald, accurately recognized that the situation in the present case was far different, since two large holders were bitterly fighting for control. As previously noted, the counter-balancing block greatly dilutes the value of control, and hence reduces any control premium. In consequence, Gant testified that he too thought there would be no premium value attached to CC's lead of 42% to 37% (Tr. 498), that indeed any third-party stepping into the "messy and complicated" fight might have wanted a discount (Tr. 501-2), and that at most a premium figure between 5% and 10% over fair market value might be garnered for the ultimate control position [not for merely the opportunity to gain control]. (Tr. 521). Gant defended his analysis as follows:

> I am describing an atmosphere in which the holder of the majority has a very vocal minority stockholder who is contesting his position and where the board is divided and where litigation proceeds, [and] that is not an atmosphere that most people want to get into and for which they will pay a premium. (Tr. 521).

Gant together with Fitzgerald emerged as the experts on whom the most reliance could be placed in reaching the damages to be ascertained here; Gant together with Fitzgerald gave the most acceptable and convincing guidance on the issues.

Gant was the only expert to directly explain and quantify the premium that is at the base of this Court's determination, i. e., the premium that exists in a large minority block when that is counterbalanced by another block almost as large that stands in the way of full harmonious utilization of ultimate control if and when that may be acquired.

The Court has weighed all the relevant factors indicated in the testimony and reports of the experts and the exhibits introduced at the hearing. The Court has had the opportunity to see and hear the witnesses and to appraise their evidence, its potency and believability in the light of all the facts and circumstances of the trial record and the record of the hearing on the relief to be considered. The Court has appraised the reduction in the appraisal value of CC's Piper holdings attributable to BP's taking a majority position and reducing CC to a minority position. That reduction the Court finds to be $2.40 per share which is the 5% premium above fair market value that the Court finds to have been lodged in a 42% holding of Piper that was erased when BP obtained a majority with illegal purchases of stock on September 5, 1969. These findings reflect weighing of the inflating and deflating factors heretofore indicated upon the range of values of all relevant components.

The evidence persuasively established that actual majority control was worth between 5% and 10% above fair market value of Piper stock in the circumstances of this case with a block of 37% or 42% of the total capital opposing the majority. Certainly then, the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances.

Accordingly, the total damages to be awarded to CC are $1,673,988. ($2.40 times the total number of shares held by CC on September 5, 1969, (697, 495)).[20]

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[20] The Court of Appeals held that CC was under no duty to withdraw from the contest prior to September 5 and thus mitigate damages (480 F.2d at 376), despite the admission by CC's officers and experts that the fight was "lost" well prior to that date. (Tr. 30, 264-5, 681, 693, Trial Tr. 459)..



*IV. Injunction*

The Court of Appeals ordered this Court to "include in its judgment an injunctive provision barring BPC from voting for a period of at least 5 years the Piper shares it obtained through the unlawful May cash purchases and those it obtained through its exchange offer." 480 F.2d at 380.

Injunctions are extraordinary legal remedies; they are granted sparingly, and granted only under terms which insure the protection of all parties—including the party enjoined. *See* Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R. Co. 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed. 2d 1379 (1960); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Greater Iowa Corp. v. McLendon, 378 F.2d 783 (8th Cir. 1967); New York, Chicago & St. Louis R. R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 358 F.2d 464 (6th Cir. 1966). Injunctions must therefore be carefully fashioned to fit the particular facts presented. As one Court so aptly put it:

> An injunction decree should conform to the requirements of the case; it should give relief from the wrong committed but it should not be so broad as to inflict an unwarranted injury on the defendant. Servisco v. Morreale, 312 F.Supp. 103 (E.D.La. 1970).) *See also* Goldberg v. Trakas, 206 F.Supp. 867 (E.D.S.C. 1962).

The power of the District Court to attach protective conditions, if warranted, to an injunctive decree is to clear to admit of serious dispute. *See, e. g.,* Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); Salsbury v. United States, 123 U.S.App.D.C. 69, 356 F.2d 822 (D.C. Cir. 1966); J. M. Fields of Anderson, Inc. v. Kroger Co., 330 F.2d 686 (5th Cir. 1964); Professional Sports, Ltd. v. Virginia Squires Basketball Club, 373 F.Supp. 946

(W.D.Tex.1974); Puerto Rico International Airlines, Inc. v. International Association of Machinists & Aerospace Workers, 366 F.Supp. 646 (D. Puerto Rico 1973). And nowhere are the broad powers of the Court with respect to injunctions clearer than in cases involving federal securities law violations. *See* J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); S. E. C. v. Golconda Mining Co., 327 F.Supp. 257 (S.D.N.Y. 1971).

Furthermore, it is perfectly appropriate for the Court, when necessary, to impose terms and conditions upon the party at whose instance it proposes to act. Inland Steel Co. v. United States, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557 (1939); Meyers v. Block, 120 U.S. 206, 214, 7 S.Ct. 525, 30 L.Ed. 642 (1887); Russell v. Farley, 105 U.S. 433, 438, 26 L.Ed. 1060 (1882) (noting that such power has been recognized and exercised by courts "from time immemorial"). *See also* Burford v. Sun Oil, 319 U.S. 315, 333 n. 29, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

In short, in perhaps no other instance is the District Court more clearly given the power—and indeed the duty—to mold and shape the relief to fit the circumstances before it.

> [E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable . . . Inequity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . . Lemon v. Kurtzman, *supra*, 411 U.S. at 200-201, 93 S.Ct. at 1469 (Burger, Ch. J.).

The situation presently before the Court calls for precisely the sort of customized relief envisioned by the cases cited above. BP must be deprived of unfairly benefitting from its unlawful stock purchases, yet CC must not be



fortuitously placed in a position where it will be able to alter BP's investment beyond the life of the Court-ordered injunction. The Court of Appeals squarely refused to hold that CC would have gained control of Piper absent BP's conduct. This Court's injunction therefore should not award CC a benefit to which it would not otherwise be entitled. It is clear that the damage awarded fully compensates CC for the interference with its opportunity to gain control of Piper; the injunction is aimed, in contrast, at enjoining BP, not further rewarding CC.[21]

Events since September of 1969 and particularly during 1974 make special fashioning of this injunction particularly appropriate. For here, it is undisputed that both CC and BP have recently (perhaps with an eye to the ultimate resolution of this lawsuit) resumed purchasing Piper stock on the market. As of June 7, 1974, the parties owned the following Piper shares, out of 1,644,790 shares outstanding as compared with their respective investment on September 5, 1969:

| | 1969 | 1974 |
|---|---|---|
| BP | 832,706 | 857,921 |
| CC | 697,495 | 708,300 |

Therefore, an injunction prohibiting BP from voting that portion of its Piper shares that were unlawfully acquired, places CC in the position of having 708,300 of the 1,413,788 shares of Piper eligible to vote, or more than 50%. Clearly this would lift CC into benefits which its position in 1969 could not achieve by according to it the same powers of permanently altering the minority investments through

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[21] To be sure, CC will probably take management "control" of Piper during the injunction period, and such a shift is not in conflict with the Court of Appeals' mandate. CC may thus, if it be so advised, alter management policies during the injunction period.

merger, issuance of new stock, recapitalization, dividend policies, or the like.[22] Unless restricted appropriately, CC would thereby be able to convert the "temporary" injunction ordered by the Court of Appeals into a permanent prize. If the Court of Appeals had desired to grant such a license to CC, the injunction ordered would have been permanent, not temporary. It is, therefore, against this background that the injunction must be fashioned—keeping in mind the Court of Appeals' caveat that divestiture of the questioned ownership was not required and that the control battle should not be reopened. 480 F.2d at 379.

The proper balance can best be achieved by simply rolling back the calendar to September 5, 1969, much as was done for the damage inquiry. The parties should revert to their status as on that date, with BP's illegally purchased shares enjoined from voting the stock for a lengthy period. Concurrently, the corporate status of Piper should be likewise frozen as at that date for the period of the injunction. The charter and by-laws of Piper shall revert to the form and content as they existed on September 4, 1969 and shall unless otherwise ordered by the Court, continue in that form and content during the period of the injunction granted hereby.

Similarly, unless otherwise ordered, no stock, rights, options or other devices capable of expansion of capital may be issued by the Corporation or from the Piper treasury during the injunction to alter the September configuration

[22] The stock ownership of CC to the present date has never provided it with enough votes at any time to elect more than three of an eight man board or four of a ten man board. And even if BP could not have voted the illegally acquired shares (231.002) and the outstanding shares entitled to vote are reduced by that amount, CC through September 5, 1969, at no time had enough shares to elect a majority of the board nor did it have the power to vote a merger of Piper.



and no merger, dissolution, liquidation or redemption of securities shall be made; and no debt or obligation, not in the ordinary course of business shall be incurred or placed; except in accordance with the laws of Pennsylvania and pursuant to the charter and by-laws as constituted on September 4, 1969.

The period of this injunction was determined by the Court of Appeals to be not less than five years. The parties have operated as a *de facto* regency—albeit reluctantly—for some five years since the inception of this lawsuit. For better or worse, BP, while clearly exerting its majority influence in certain situations, has been stifled in fact from exercising that control in others. Undoubtedly, the spectre of a large and vocal minority block constricted BP (and perhaps, during the injunction period, CC) from acting as it [or they] would have without such a watchdog. To that extent at least, BP has already been "enjoined" in fact from utilizing the full benefits of its majority position. Nonetheless, the Court cannot agree with BP's contention that the injunction period should be deemed satisfied. Therefore, the period of the injunction ordered by this Court should commence with the filing of the decree on this opinion for the five years recommended.

In addition, this Court will retain jurisdiction during the pendency of the injunction in order to remold or modify the injunction if such a course becomes necessary or appropriate due to any change in circumstances actual or prospective. *See* American Optical Co. v. Rayex Corp., 291 F.Supp 502 (S.D.N.Y. 1967), aff'd, 394 F.2d 155 (2d Cir.), cert. denied, 393 U.S. 835, 89 S.Ct. 109, 21 L.Ed.2d 106 (1968); In re Certain Carriers, etc., 241 F.Supp. 1004 (D.D.C. 1965).[23]

[23] The final form in which the injunctive relief was cast is set out in the Appendix hereto.

*V. Other Relief*

Plaintiff has, in addition, requested that the interest charges it has borne on loans which financed its Piper investment be awarded to it as consequential damages. Plaintiff contends that its "locked-in" position has precluded the possibility of any escape from Piper, and thus such interest charges are properly recoverable.

There has been no showing that CC has been "locked-in" so that sale of its Piper stock has been impossible. Indeed, the proof adduced at the present hearing was directed precisely at determining the discount due to the minority position. The cost of the use of credit or margin to acquire stock is not a proper element of damage to a purchaser's interest. Moreover, an award of such interest herein would stretch the Court of Appeals' mandate beyond its properly intended limits. Consequential damages are awarded only upon a clear showing of causal connection with the misconduct and the consequence claimed. Zeller v. Bogue Electric Mfg. Corp., 476 F.2d 795 (2d Cir.), cert. denied, 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973). Such a showing has not been and cannot be made here for purposes of an award of interest to CC on the unpaid portion of the purchase price of the Piper stock acquired by CC.

Plaintiff also seeks prejudgment interest on the recovery from the date of the wrong. Where, as here, a claim for relief is federally created, the allowance of interest is to be decided by federal law. *See* Note, Interest on Judgments in the Federal Courts, 64 Yale L. J. 1019, 1040 (1955) (hereafter cited as "Note"). *See also* Perkins v. Standard Oil Co. of California, 487 F.2d 672, 675 (9th Cir. 1973); Briggs v. Pennsylvania R. R. Co., 164 F.2d 21, 22 (2d Cir. 1947), affirmed without consideration of this point, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948); Murphy v. Lehigh Valley R. R. Co., 63 F.Supp. 928, 929-930 (E.D.N.Y. 1945).



modified, 158 F.2d 481 (2d Cir. 1946). State statutes in respect of prejudgment interest, *e. g.*, N.Y.C.P.L.R. § 5001 (b) (McKinney's Supp. 1973), are thus inapplicable. *See Note, supra,* at 1040.

Prejudgment interest may be awarded where provision therefor is made in the federal statute which creates the federal remedy. *See* 10 Wright & Miller Federal Practice and Procedure § 2664 (1973). In the absence of a specific statute, the operative statute is 28 U.S.C. § 1961. *See Note, supra* at 1040. The federal securities laws are silent in respect of interest. Section 1961 provides, in pertinent part, as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

Thus, the statutory authority provides only for interest on a money judgment, and thus "would seem to exclude the inference that interest should be allowed upon verdicts before judgment." Massachusetts Benefit Assn. v. Miles, 137 U.S. 689, 691, 11 S.Ct. 234, 235, 34 L.Ed. 834 (1891). *But see* Louisiana & Arkansas Ry. Co. v. Export Drum Co., 359 F.2d 311, 317 (5th Cir. 1966) (§ 1961 inapplicable to the question of whether prejudgment interest is a proper element of damages).

Nonetheless, a number of Courts which have considered the question of prejudgment interest in federal securities cases have ruled that the absence of statutory authority other than § 1961 has left the award of equitable prejudgment interest to the discretion of the Court, to be decided by balancing the equities and weighing notions of fairness to the parties. *See, e. g.,* Blau v. Lehman, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); Wolf v. Frank, 477 F.2d

467 (5th Cir. 1973, cert. denied, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973), rehearing denied, 414 U.S. 1104, 94 S.Ct. 739, 38 L.Ed.2d 560 (1973); Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971); Norte & Co. v. Huffines, 416 F.2d 1189 (2d Cir. 1969), cert. denied sub nom., Muscat v. Norte & Co., 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); Speed v. Transamerica Corp., 135 F.Supp. 176 (D.Del. 1955), affirmed, 235 F.2d 369 (3rd Cir. 1956); Pearlstein v. Scudder & German, 346 F.Supp. 443 (S.D.N.Y.1972); Ross v. Licht, 263 F.Supp. 395 (S.D.N.Y.1967); Collier v. Granger, 258 F.Supp. 717 (S.D.N.Y.1966); Pappas v. Moss, 257 F.Supp. 345 (D.N.J.1966), rev'd other grounds, 393 F.2d 865 (3rd Cir. 1968); Perfect Photo, Inc. v. Grabb, 205 F.Supp. 569 (E.D.Pa.1962). *Cf.* Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed.313 (1939) ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.").

The foregoing decisions have not adverted to the question whether Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) had any significant impact on notions of the common law that recognized discretionary power to increase damages by interest awards or the effect if any of the post-*Erie* reenactment of 28 U.S.C. § 1961, which squarely addressed the question of interest.

Interest on the obligations created by the securities laws is or is not payable depending upon the purpose of the statutory enactment as applied and upon principles of equity. In equity, the allowance of interest supplies a means of compensating a creditor for loss of use of his money. Thus, recoveries of one's own money through claims bottomed on Sections 12 and 17 of the '33 Act and 10(b) of the '34 Act readily fall within a debtor-creditor



relationship; and equity may quite properly supply prejudgment interest awards in such cases.

However, where the statute is used to vindicate the prophylactic purposes of the law and a private recovery is therefore allowed to a litigant in the posture of this plaintiff, there is a question whether the equitable principle should apply. If the allowance of interest on such an obligation "would serve only to increase the penalty and not to compensate for loss of use of money owing a creditor" (United States v. United Drill & Tool Corp., 87 U.S.App.D.C. 236, 183 F.2d 998, 1000, 1950), allowance of interest becomes questionable.

No instructions with respect to allowance of interest were included in the mandate.[24] However, the basis for and object of the damage award found by the Court of Appeals seem intended to carry the addition of prejudgment interest on the recovery as quantified herein. Consequently, such interest is allowed and shall be computed on the recovery from September 5, 1969 at the legal rate and included in the decree to be entered.

Finally, plaintiff has requested an award of attorney's fees, arguing that a public rather than a selfish interest has been served by this litigation. *See* SEC v. Capital Counsellors, Inc., 378 F.Supp. 224 (S.D.N.Y.1974). If anything is clear concerning this lengthy and bitterly fought litigation, it is that service of the public interest was not CC's motivation and any such service has been wholly incidental and has been amply satisfied by the damages awarded to CC. The law in this country has not yet reached

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[24] The entire problem of interest becomes obviated for a District Court when Rule 37 of the Federal Rules of Appellate Procedure is utilized. That provides that where the District Court's judgment is reversed, the mandate "shall contain instructions with respect to allowance of interest."

the point of rewarding victorious litigants with counsel fees in the circumstances here present; at all events, such an award in this case is not warranted and is denied.

Costs are awarded to the plaintiff to be taxed by the Clerk.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a) Fed.R.Civ.P.

The parties may submit a decree accordingly conforming with Rule 54(a) Fed.R.Civ.P. for consideration by the Court.

So ordered.



# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*

v.

PIPER AIRCRAFT CORPORATION, HOWARD T. PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, and THE FIRST BOSTON CORPORATION,
*Defendants.*

69 Civ. 2227 (MP)

## MEMORANDUM ON SETTLEMENT OF JUDGMENT

The Court has received and considered suggestions from the parties in respect of the form and content of the decree to be entered herein. The conflicts of view have been resolved as set forth in the judgment filed this day so as to conform to the intent of the Court in respect to the decision made. The following explanatory comments may be of use.

During the injunction period the capital investment of Piper Aircraft Corporation owned by Bangor Punta is not to be reduced or confiscated in part—under the mandate of the Court of Appeals and under the Decree of this Court, the 231,002 Piper shares held by Bangor Punta are viewed as having been legally authorized, issued and outstanding but are made non-voting for a period of five years hereafter. Thus, the power of Bangor Punta to merge without consent of CC which was the principal concern of the Court of Appeals is thus effectively removed from Bangor Punta for the injunction period.

To afford Chris Craft an additional benefit, the decree fashioned by the Court makes this freeze of the vote on those shares retroactive in effect to September 4, 1969. The only use of the vote attaching to the 231,002 shares of Piper stock that has been made by Bangor Punta in the interim has been at the sole stockholders' meeting of Piper held on February 1, 1971 and to undo that use, the Court is directing a new stockholders' meeting at which the 231,002 shares will not be votable shares.

Similarly, since it may be assumed that Bangor Punta had a majority of the Piper board during the interim period as well as prior to September 4, 1969, and that the incumbents are entitled to remain in office until their successors are elected at the next stockholders' election for directors, the Court is adding the benefit to those Chris-Craft receives by directing a near-by vote of stockholders for their choice of directors.

Chris-Craft is not being deprived of a single right which it had on September 4, 1969 according to its own voting strength—nor are voting rights being conferred on Chris-Craft which it did not have. Bangor Punta is being denied part of its voting strength for five years hereafter and this deprivation is being made retroactive to September 4, 1969 by 1) setting aside by-law changes which it caused to be made since that date, and 2) ordering a new election for the one held on February 1, 1971 where Bangor Punta used its total voting strength.

Moreover, since Bangor Punta is entitled at the end of the freeze on part of its voting power to be reinvested therewith, it is entitled to be assured that its property rights in the shares affected which were lawfully authorized and are outstanding and for which it paid and which have not been ordered to be confiscated by the mandate, to know that the corporate assets in which its holds a 51% ownership will not be merged, liquidated or distributed without its consent



during the period that some of its share ownership becomes non-voting for management purposes. This does not give Bangor Punta a negative vote as suggested by the plaintiffs, it merely recognizes the fact that Bangor Punta is a 51% owner of the enterprise and equity regardless of the size of its voting rights.

The plaintiff has suggested that the declaration that Bangor Punta's non-voting shares are to be considered "outstanding for all purposes" suggests that they may be counted for quorum purposes. The Decree will therefore specifically provide that not only shall the 231,002 shares not be voted but they may not be counted for quorum purposes for the period of the injunction.

There is no prohibition in the Decree against an agreement between Chris-Craft and Bangor Punta for merger, liquidation or dissolution as the plaintiff seemingly suggests. The provision in the Decree is designed to prevent the confiscation, without such agreement, of the equity capital owned by Bangor Punta in Piper which Chris-Craft might otherwise be free to undertake albeit the holder of only a minority of the equity capital. The Court of Appeals has ruled that ownership of the equity capital was not to be disturbed; the questioned shares were not to be reoffered to the public for sale; no new round of the control fight was to take place.

> Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages. 480 F.2d at 379.

The plaintiff states that the Board of Piper will be deadlocked in the future. If so, and this is not inevitable, the

plaintiff will have gained an advantage that its equity voting strength did not entitle it to without the injunction.

The plaintiff has requested a stay of the Decree pending appeal. However, none of the provisions operate to the disadvantage of plaintiff; they may not be everything that plaintiff hoped for. The notion that Piper will be more stable if the Court does not now suspend Bangor Punta's vote on the 231,002 shares and undo the vote thereof used in February 1971, seems at odds with reality. A stay pending appeal is not required if the object is really to add to the mandate of the Court of Appeals—revision of the mandate must come from the Court of Appeals itself.

It therefore seems to the Court appropriate that the clock should start running now against the voting power of Bangor Punta's 231,002 shares—not later. There has been a de facto regency since 1969 in which the record fails to show any gains by Bangor Punta for itself or any of the true advantages of management control such as enhancement in the value of its ownership interest in Piper. In practical contemplation there has already been a five year suspension of the use to Bangor Punta of the vote on the 231,002 shares and of its ability to compel a merger at any time. The Decree adds on a like period for the future.

The plaintiff's application for a stay of the Decree pending appeal is consequently denied.

MILTON POLLACK
*U.S. District Judge*

November 22, 1974



# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*

v.

PIPER AIRCRAFT CORPORATION, HOWARD T. PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, and THE FIRST BOSTON CORPORATION,
*Defendants.*

69 Civ. 2227 (MP)

## FINAL JUDGMENT AND DECREE

The above-entitled action having come before the Court for hearing on April 22, 23, 24 and 25, 1974, with respect to the relief to be granted herein after the defendants Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation, Nicholas M. Salgo, David W. Wallace and The First Boston Corporation were held liable to the plaintiff Chris-Craft Industries, Inc. by the judgment and mandate of the United States Court of Appeals for the Second Circuit (480 F.2d 341), and the Court having rendered a decision dated November 6, 1974.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the 231,002 shares of Piper Aircraft Corporation ("Piper") now owned by Bangor Punta, and acquired by it through cash purchases in May, 1969 from Fund of Funds Proprietary Fund, Inc., American Securities Corporation and Bay Securities Corporation and in an exchange offer in July, 1969 to the then shareholders of Piper, shall

be considered authorized and outstanding for all purposes under the laws of Pennsylvania and under this decree, but shall not be voted hereafter by or on behalf of Bangor Punta or counted for quorum purposes for a period of five years and Bangor Punta be and hereby is enjoined accordingly. To the extent that any of such 231,002 shares shall be transferred to former Piper shareholders who accept Bangor Punta's offer to rescission pursuant to the decree of this Court dated May 3, 1974 in *S.E.C.* v. *Bangor Punta,* 70 Civ. 3940, the transferred Piper shares shall be free of this injunction and the voting thereof shall not be restrained by anything contained in this decree.

2. That the changes in Piper's By-Laws and in the size of Piper's Board of Directors since September 4, 1969 shall be rescinded and during the period of the injunction granted by this Decree Piper's By-Laws and the size of its Board shall be reinstated and together with its charter shall remain as they were constituted on September 4, 1969, unless otherwise agreed by the plaintiff and the defendant Bangor Punta or ordered by the Court for good cause shown.

3. That the individual defendants Nicholas M. Salgo, David W. Wallace and William T. Piper, Jr., together with the representatives of Bangor Punta on the Piper Board, at the next meeting of said Board scheduled for December 2, 1974, shall vote for resolutions to cause Piper to convene a meeting of its stockholders for the purpose of electing directors, the meeting to take place within approximately ninety (90) days of such Board action, and at the same meeting to take the necessary action to immediately reinstate Piper's By-Laws as directed above except for the provision which expanded the Board from eight to ten members, the requirement to restore the size of the Board to eight members is to take effect the day of the said stockholders' meeting. In the intervening period between the call



of the stockholders' meeting and the meeting itself, on consent of Bangor Punta, no action shall be taken at a Board meeting of the Piper Board without the consent of the four representatives of Chris-Craft on the Board and Piper shall not seek or be caused to seek proxies for any designee for the said election of directors.

4. That no shares of Piper owned by Chris-Craft or Bangor Punta and no representative of the stockholdings in Piper owned by either corporation, or holding office as a director of Piper shall vote for or acquiesce in (1) the issuance of any stock, rights, options or other devices capable of increasing the outstanding voting shares of Piper beyond the number outstanding as of September 4, 1969, or (2) redemption, reduction, or purchase by Piper of Piper's voting shares outstanding as of September 4, 1969, or, (3) a merger, dissolution or liquidation of Piper, unless the same is ordered by the Court.

5. That the Court will retain jurisdiction during the pendency of the injunction granted to modify said injunction if such a course becomes necessary or appropriate due to any change in circumstances actual or prospective.

6. That Chris-Craft shall recover of defendants, Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation, Nicholas M. Salgo, David M. Wallace, and The First Boston Corporation, jointly and severally, the sum of $1,673,988, plus interest in the amount of $599,010.89, with costs to be taxed by the Clerk.

MILTON POLLACK
*U.S. District Judge*

Dated: New York, New York
November 22, 1974

## C.


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*Court of Appeals Opinion on Preliminary Injunction*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 249—September Term, 1969.

(Submitted to the court *in banc*
February 2, 1970* Decided April 28, 1970.)

Docket No. 33983

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CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

*v.*

BANGOR PUNTA CORPORATION and DAVID W. WALLACE,

*Defendants-Appellees.*

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B e f o r e :

LUMBARD, *Chief Judge,*
WATERMAN, MOORE, FRIENDLY,** SMITH, KAUFMAN,
HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

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* Argued on September 19, 1969 before a division of the court composed of Chief Judge Lumbard and Judges Waterman and Kaufman. After the filing of panel opinions on November 6, 1969 a petition for rehearing with suggestion that the full court also rehear the case was timely filed. The division denied the rehearing petition as of January 12, 1970, but a rehearing *in banc* was then granted, the *in banc* reconsideration to be had without further oral argument. The parties were granted permission to file further briefs on or before February 2, 1970.

** After the nine active judges decided to rehear the case *in banc* Judge Friendly refrained from any further participation in the disposition of the case.

*Court of Appeals Opinion on Preliminary Injunction*

Appeal from an order denying a motion for an injunction *pendente lite,* United States District Court for the Southern District of New York, Tenney, *J.* Order affirmed. However, as the rationale of affirming opinion differs materially from rationale of opinion below the case is remanded for further proceedings.

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ARTHUR L. LIMAN, JOSEPH J. ACKELL, ALAN L. SCHLOSSER, PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON, New York City, *for Plaintiff-Appellant.*

JAMES V. RYAN, WILLIAM L. D. BARRETT, NANCY L. PASLEY, WEBSTER, SHEFFIELD, FLEISCHMANN, HITCHCOCK & BROOKFIELD, New York City, *for Defendants-Appellees.*

PAUL G. PENNOYER, JR., ZACHARY SHIMER, IRENE CONRAD WARSHAUER, CHADBOURNE, PARKE, WHITESIDE & WOLFF, New York City, *for Piper Aircraft et al.*

PHILIP A. LOOMIS, JR., General Counsel; David Ferber, Solicitor; Meyer Eisenberg, Associate General Counsel; Harvey A. Rowen, Attorney, Securities & Exchange Commission, *for Amicus Curiae.*

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WATERMAN, *Circuit Judge*:

Plaintiff-appellant, Chris-Craft Industries, Inc., appeals from the denial of an order entered below in the United States District Court for the Southern District of New York denying appellant's motion for a preliminary injunction to



*Court of Appeals Opinion on Preliminary Injunction*

restrain Bangor Punta Corporation from gaining and exercising control of Piper Aircraft Corporation pending a trial on the merits of whether certain shares of Piper were acquired by Bangor Punta in violation of governing Rules of the Securities and Exchange Commission. We affirm the denial of the preliminary injunction but remand the case to the district court for further proceedings there not inconsistent with the within opinion.

This litigation comes at the end of a hard fought battle between Chris-Craft Industries and Bangor Punta Corporation for control of Piper Aircraft Corporation. The contest opened in January 1969 when Chris-Craft began to acquire Piper shares on the open market. At that time Piper had 5,000,000 authorized shares of $1.00 par common stock of which 1,641,890 shares were issued and outstanding. In January 1969 Chris-Craft made a public exchange offer for 300,000 Piper shares, and by February these efforts had gained Chris-Craft 34 per cent of the then outstanding Piper stock. On February 27, 1969, Chris-Craft filed with the Securities and Exchange Commission a registration statement and proposed prospectus for an exchange offer for an additional 300,000 shares. Still another exchange offer was announced by Chris-Craft on May 7 and became effective July 24.

Chris-Craft's bid for control met strong resistance from the Piper family and Piper management, who owned 501,090 shares (31 per cent of the outstanding shares), and considered Chris-Craft to be a corporate raider. The management advised other Piper shareholders that Chris-Craft's tender offer was inadequate but offered 300,000 of Piper's authorized but unissued shares to Grumman Aircraft Corporation at the same price that Chris-Craft had offered. Although this transaction was never consummated, Piper initially advertised that Grumman had agreed to purchase

the Piper shares and the court below noted that Chris-Craft's tender offer was adversely affected by this publicity.

Subsequently, on March 22, the Piper management issued 469,199 shares of authorized but unissued stock to acquire control of two subsidiary corporations, United States Concrete Pipe Company of Florida and Southply, Inc. Piper failed to seek the approval of the New York Stock Exchange and of its own shareholders as its listing agreeement with the Exchange provided it should before issuing a significant new block of stock. Therefore, the Exchange refused to approve Piper's listing application. When the Exchange shortly afterward suspended trading in Piper shares and authorized proceedings before the SEC to delist Piper, Piper rescinded both transactions and trading in its shares was resumed.

At this juncture, in April 1969, the Piper family resumed talks which had begun as early as January with Bangor Punta Corporation. These negotiations bore fruit on May 8, when the two groups agreed that the family would exchange its 501,090 shares for specified Bangor Punta securities. Bangor Punta agreed in addition to use its best efforts to acquire enough additional Piper shares to make it the holder of more than 50% of the shares outstanding. As part of these best efforts, Bangor Punta agreed to make an exchange offer to all Piper shareholders "under which such holders will be entitled to exchange each share of Piper common stock held by them for Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." If Bangor Punta succeeded in acquiring 50% or more of the stock, the consideration paid by Bangor Punta would be increased to make up to the Piper family the difference, if any difference there were, between the value of the package specified in the agreement and $80 per share.



The two occurrences which form the basis of Chris-Craft's complaint followed the negotiation of this contract. The first of these occurrences was the issuance by Bangor Punta and the Piper management of press releases announcing the transaction on May 8, the day the contract was signed and the day after Chris-Craft announced the terms of its second exchange offer. After stating that the Piper family would receive Bangor Punta securities for their shares, the Bangor Punta press release continued as follows:

> Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share. The registration statement covering all securities to be issued will be filed as soon as possible and a meeting of the shareholders of Bangor Punta Corporation will be called for approval.
>
> Mr. Piper said that in view of Bangor Punta's longstanding policy of maintaining autonomy in the management of its operating companies, and the similarity of operating philosophies between the two companies, he and the Piper family would strongly support the merger and would recommend it to all shareholders.
>
> Mr. Wallace said Bangor Punta welcomed the association with Piper Aircraft, its world-wide distribution, and its prestigious product name. He said the consolidation would align the Piper Aircraft name with other leading Bangor Punta companies, including Smith & Wesson, Starcraft Company, and Waukesha Motor Company.

> Bangor Punta manufactures a wide variety of recreational vehicles including sailboats, houseboats, snowmobiles, campers, trailers and motor homes. A merger of Bangor Punta and Piper Aircraft would bring Bangor Punta into the light aircraft manufacturing business.
>
> Sales of the combined companies would reach $450,000,000 in fiscal 1969, with approximately $180,000,000, or 40%, in the aircraft, recreational and leisure time fields.

Piper Aircraft Corporation simultaneously issued a similar press release.

These announcements attracted an immediate response from the Securities and Exchange Commission, which felt that the release constituted an offer to sell securities before any registration statement had been filed. Accordingly the SEC instituted an action against Bangor Punta and Piper in the United States District Court for the District of Columbia on May 26, and on the same day the defendants consented to the entry of judgment and the issuance of an injunction prohibiting further releases of a similar nature before Bangor Punta's registration statement and prospectus were filed.

The second occurrence or set of occurrences of which Chris-Craft complains took place between May 14 and May 23, when Bangor Punta purchased 120,200 shares of Piper stock for cash in private transactions. Chris-Craft alleges that on April 7, 1969, the staff of the SEC warned Chris-Craft's top executives that continued cash purchases of Piper stock while Chris-Craft's own exchange offer was outstanding, as the first one then was, would be regarded by the SEC as a violation of Rule 10b-6, which prohibits



an issuer from purchasing securities while still participating in their distribution. Chris-Craft did refrain from further purchases during the remainder of its first tender offer and all of its second. Bangor Punta's purchases of stock between May 14 and May 23 occurred while its exchange offer was outstanding if one assumes that the May 8 press release constituted an offer to sell, as the SEC charged that it did. Bangor Punta states that although the SEC knew of its cash purchases at the time the consent decree was discussed, May 23 to May 26, the SEC nonetheless failed to challenge these purchases or ask for their rescission. However, it is undisputed that the SEC announced publicly its position on such purchases in a press release issued May 5.

Bangor Punta's exchange offer closed on July 29, and Chris-Craft's second offer ended August 4. At that time Bangor Punta held 45% of Piper's stock, and Chris-Craft held 40%. By the time this case came to argument on appeal, Chris-Craft had increased its holdings to 46.2% of Piper's common stock, while Bangor Punta had finally acquired a majority with 52.7%.

Chris-Craft commenced the present lawsuit on July 22, 1969, seeking a preliminary injunction which would order Bangor Punta (1) to offer the right to rescind to all persons who had tendered Piper shares to Bangor Punta persuant to its exchange offer, (2) to refrain from acquiring further Piper shares, (3) to refrain from effecting a merger of Piper and Bangor Punta, and (4) to refrain from voting the 120,200 Piper shares acquired for cash between May 16 and May 23, 1969. The district court denied Chris-Craft's motion for a preliminary injunction, citing both the lack of any irreparable injury to Chris-Craft if the motion were denied and the lack of any illegal behavior

on the part of Bangor Punta. Chris-Craft then sought and received an expedited appeal to this court.

### *The Preliminary Injunction*

We agree with the district court that a preliminary injunction is not warranted. A preliminary injunction should issue only when it is needed "as an equitable policing measure to prevent the parties from harming one another during the litigation," *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2 Cir. 1953). It is apparent that here there is no threat that unless an injunction issues before trial "the plaintiff will suffer harm that cannot be repaired." *Studebaker Corp.* v *Gittlin*, 360 F.2d 692, 698 (2 Cir. 1966). Counsel for Bangor Punta has orally stipulated at argument that no merger between that company and Piper will be effected before the end of this litigation, so that no injunction restraining a merger is needed. We do not see, and Chris-Craft does not suggest, what other irreparable harm might result from Bangor Punta's voting the 120,200 shares acquired for cash in May.

Absent any such prejudice from the voting of the stock we do not see how harm to plaintiff can result from refusing to order before the merits of the case are adjudicated after a trial a divestiture or rescission of stock acquired by Bangor Punta during its exchange offer. Indeed, to "give to a plaintiff all the actual advantage which could be obtained by the Plaintiff as a result of a final adjudication of the controversy in favor of the plaintiff" would be clearly inequitable under such circumstances. *Selchow & Richter Co.* v. *Western Printing & Lith. Co.*, 112 F.2d 430, 431 (7 Cir. 1940). We also understand counsel for Chris-Craft to admit on oral argument that because of its complexity an order for rescission or divestiture should be worked out only at trial.



Finally, we conclude that the district court did not err in refusing to enjoin the continued solicitation of stock by Bangor Punta. At that time Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage. Consequently, we affirm the denial of the preliminary injunction.

However, we also feel compelled to pass on the district court's alternative holding that Bangor Punta did not violate the securities laws, for it is clear that this ruling below would determine the outcome of the trial on the merits. On this issue we disagree with the district court.

### *The May 8 Press Releases*

Section 5(c) of the Securities Exchange Act of 1933, as amended, states in part that:

> (c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .

Section 5(b) of the Act provides that offers to sell may be made after the registration statement is filed, but before it becomes effective, provided the offers are made by specified means which include the use of a prospectus meeting the requirements of Section 10.

The Securities and Exchange Commission has promulgated Rule 135 to exempt certain disclosures of forthcoming

issuances from the definition of an "offer to sell" prohibited by Section 5(c). This Rule reads in relevant part as follows:

> (a) For the purposes only of section 5 of the Act, the following notices sent by an issuer in accordance with the terms and conditions of this rule shall not be deemed to offer any security for sale:
>
> • • • • •
>
> (2) A notice to any class of security holders of such issuer or of another issuer advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders;
>
> • • • • •
>
> (b) Such notice shall be sent not more than 60 days prior to the proposed record date for determining the security holders entitled to subscribe to the securities or, if there is no such record date, not more than 60 days prior to the proposed date of the initial offering of the securities.
>
> (c) The notice shall state that the offering will be made only by means of a prospectus which will be furnished to such security holders or employees, as the case may be, and shall contain no more than the following additional information:
>
> (1) The name of the issuer;
>
> (2) The title of the securities proposed to be offered;
>
> • • • • •
>
> (4) In the case of an exchange offering, the name of the issuer and the title of the securities to be sur-



> rendered in exchange for the securities to be offered, the basis upon which the exchange is proposed to be made and the period during which the exchange may be made, or any of the foregoing;
>
> • • • • •
>
> (6) Any statement or legend required by State law or administrative authority.

Chris-Craft argues, and the argument is supported by the SEC, both in its action filed May 26 against Bangor Punta and in its *amicus curiae* brief in this court, that the categories of information privileged under the Rule are exclusive. In view of this exclusivity they contend that as the rule does not mention disclosure of the value of the securities to be offered, Bangor Punta's and Piper's announcements that the package of securities offered by Bangor Punta would be valued at $80 oversteps the exemption and makes the press release an offer to sell.

We agree with this contention. When it is announced that securities will be sold at some date in the future and, in addition, an attractive description of these securities and of the issuer is furnished, it seems clear that such an announcement provides much the same kind of information as that contained in a pospectus. See *SEC* v. *Arvida Corp.*, 169 F. Supp. 211 (SDNY 1958). Doubtless the line drawn between an announcement containing sufficient information to constitute an offer and one which does not must be to some extent arbitrary. A checklist of features that may be included in an announcement which does not also constitute an offer to sell serves to guide the financial community and the courts far better than any judicially formulated "rule of reason" as to what is or is not an offer. Rule 135 provides just such a checklist, and if the Rule is not construed

as setting forth an exclusive list, then much of its value as a guide is lost.

Moreover, it is reasonable to conclude that the assigning of a value to offered shares constitutes an offer to sell. One of the evils of a premature offer is its tendency to encourage the formation by the offeree of an opinion of the value of the securities before a registration statement and prospectus are filed. There is then no information on file at the SEC by which the Commission can check the accuracy of the information which forms the basis of the offeror's estimate of value, and any offeree, such as the reader of a press release, is encouraged to form a premature opinion of value without benefit of the full set of facts contained in a prospectus.

Here a statement of the value of the securities Bangor Punta offered was made directly in the announcement. It is true that the value which the reader of the May 8 press releases could be expected to accept is a value based upon the opinion of a reputable financial corporation and not upon general and necessarily speculative facts about the nature of the offeror's business, as in *Arvida, supra.* However, the true significance of the $80 value which Bangor Punta claimed for its securities package was nonetheless unclear. Chris-Craft charges that the figure constituted an outright misrepresentation inasmuch as most readers would construe the figure as representing the market value of the package. In fact, Chris-Craft charges, some of the securities in the package had not previously been sold on the market at all, and the market value of Piper shares never reached $80 in response to the Bangor Punta exchange offer, so that the Bangor Punta securities did not have an $80 market value and could not honestly have been thought to have such a value. We need not reach the question whether prudent investors would have so construed the $80



value or whether it would have been assumed, as was apparently the case, that the value referred to was based on such considerations as Bangor Punta's earnings and asset value as well as upon the sales price of the securities. It is enough to point out that under either construction the SEC had no way of checking the honesty of the figure, and that the public did not receive the detailed information it would have received from a prospectus issued after a registration statement had been filed. Such information would have eliminated the possibility, perhaps the probability, that some persons would have construed the $80 figure as referring to market value when that value was neither accurate nor intended.[1]

Bangor Punta and Piper argue that even prior to the filing of a registration statement an immediate disclosure of market value is compelled in cases such as this both by *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968), *cert. denied as to issues not pertinent here*, sub nom. *Coates* v. *SEC*, *Kline* v. *SEC*, 394 U.S. 976 (1969), and by the rules of the New York Stock Exchange. We do not agree. The only material fact in this case within the meaning of *Texas Gulf Sulphur* was Bangor Punta's commitment to offer its securities for Piper Aircraft shares. Rule 135 provides adequately for the announcement of a material fact such as this; further disclosure would, as stated above, thwart other policies of the securities laws. Had Bangor Punta observed Rule 135 by revealing immediately its intention to make an exchange offer and by later revealing the titles of the securities it proposed to offer and the basis or ratio on which the exchange was proposed to be made as soon as

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[1] The prospectus which Bangor Punta later issued contained a complete description of the securities it was offering for Piper stock, including the over-the-counter sales price of those securities to which such a price was applicable.

these matters were decided, adequate information concerning the proposed transaction would have been placed before the public and the potentially misleading estimate of value would have been avoided.[2] Even if we assume that knowledge of the value figure involved here might conceivably have conferred some benefit on insiders had it not been revealed, we feel that this risk of unfair advantage is outweighed by the danger that substantial numbers of investors were misled by the figure's publication. The fact that a few additional sophisticated investors could have discovered the $80 value guarantee in the description of the transaction which Bangor Punta filed with the SEC pursuant to Section 13(d) of the 1934 Act is of no moment. Such investors would almost certainly be small in number, and any arguable danger of permitting them an unfair advantage is outweighed by the stronger probability that the press release misled a large number of unsophisticated investors.

The same principles apply to the New York Stock Exchange's requirement[3] that insiders disclose information likely to affect the market unless such information can be restricted to a small group of top management officials. In any event, a policy of the New York Stock Exchange, although entitled to considerable respect, cannot bind the Commission or the courts. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). To hold that disclosure would be privileged here because the $80 value could not be kept secret and might affect the market would mean that many other companies could offer to sell securities before their registration by claiming that the terms of the proposed offer could not be kept totally secret and must

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[2] See, generally, SEC Release No. 33-5009 (Oct. 7, 1969).

[3] New York Stock Exchange Co. Manual, Section A2.



therefore be disclosed in full. Consequently we hold that the May 8 press release by Bangor Punta violated Section 5(c) and therefore we remand the action to the district court for it to consider in light of this opinion and with the benefit of any further evidence which the parties may present at trial what the most suitable remedy for the violation might be.

### *Bangor Punta's Purchases of Stock During Its Exchange Offer*

Rule 10b-6 forbids "any person . . . (2) who is the issuer or other person on whose behalf . . . a distribution is being made . . . to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution . . . or any right to purchase any such security . . . ."

On May 5, 1969, before the purchases of which Chris-Craft complains, the SEC issued release No. 34-8595, announcing a proposed Rule 10b-13. This Rule, which did not become effective until November 10, 1969, reads in part as follows:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or

> exchange offer may by the terms of such offer be accepted or rejected; . . . .

The SEC announced in the same release that Rule 10b-13 served only to restate law which already existed:

> This provision is, in effect, a codification of existing interpretations under Rule 10b-6, which among other things, prohibits the person making a distribution from bidding for or purchasing the security being distributed or any right to acquire that security. These interpretations have pointed out that the security to be acquired in the exchange offer is, in substance, either a right to acquire the security being distributed or is brought within the rule under paragraph b thereof; and Rule 10b-6 prohibits the purchase of such security during the distribution except through the exchange offer, unless an exemption is available.

Despite the reference in the Release to "a codification of existing interpretations under Rule 10b-6," neither the SEC nor the parties to this action have cited any such precedents, nor have we found any. However, we do not find this lack of precedent crucial if Rule 10b-6 should independently be found to apply to purchases of stock while exchange offers for such stock are outstanding.

One of the primary purposes of Rule 10b-6 is to prevent an issuer of stock from manipulating the market for that stock. As the court stated in *SEC* v. *Scott Taylor & Co.*, 183 F. Supp. 904, 907 (SDNY 1959):

> Manipulation was often accomplished by those about to sell securities or already engaged in selling securities bidding on the market for the same securities, thereby



> creating an unjustifiable impression of market activity which would facilitate the sale at artificially high prices. This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is the practice which is covered by Rule X-10b-6. (Footnote omitted.)

See also, *Weitzen* v. *Kearns*, 271 F. Supp. 616, 623 (SDNY 1967), *Miller* v. *Steinbach*, 268 F. Supp. 255, 280 (SDNY 1967); *SEC* v. *Electronics Security Corp.*, 217 F. Supp. 831, 836 (D. Minn. 1963).

Bangor Punta argues that its purchase of Piper stock could only serve to drive up the price of Piper stock and thus to make the Bangor Punta shares offered in exchange appear less attractive—the opposite effect from that which Rule 10b-6 would normally seek to prevent. However, this argument overlooks the decided benefits that purchases of target company stock can produce for the initiator of an exchange offer. If the price of the target company's stock does increase in response to cash purchases by the exchange offer or after the offer has been announced, many shareholders in the target company are likely to assume that the price increase results solely from the bullish effect of the exchange offer on the market. Small investors especially would be likely to assume that the exchange offer was receiving serious attention and approbation from larger, more knowledgeable investors than they. The managements of either the target company or the offeror can compound this impression by announcing the number of shares of target stock acquired by the offeror since the initiation of the exchange offer. Absent some indication to the contrary, the target company shareholders would be likely to assume that the entire increase resulted from the offer, not from cash purchases in addition to the offer.

Prevention of this kind of manipulation seems well within the spirit of Rule 10b-6. It is within the letter of the Rule as well. As quoted above, part (a) of Rule 10b-6 prohibits the issuer of a security not only from purchasing the issued security itself while offering it, but also from purchasing "any right to purchase any such security." Here the Piper shares carried the right to acquire Bangor Punta securities as a result of Bangor Punta's exchange offer. Consequently, we hold that Bangor Punta could not lawfully purchase these shares during the tenure of its exchange offer.

It remains open to Bangor Punta to demonstrate at trial that its purchases fall within the exemption provided by Rule 10b-6 for "unsolicited . . . purchases . . . effected neither on a securities exchange nor from or through a broker or dealer . . . ." Moreover, we do not pass any judgment at this time on the question of what remedy is appropriate in regard to Bangor Punta's unlawful purchases of stock, nor on the significance of the fact that Chris-Craft itself purchased stock during an exchange offer prior to the SEC's warning.

We remand for further proceedings not inconsistent with this opinion.

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MOORE, *Circuit Judge* (concurring in part):

I concur in the affirmance of the order denying a preliminary injunction. Under customery procedure, the issues framed by the pleadings would come on for trial. Upon such facts as might be developed upon such a trial and the conclusions of law found to be applicable thereto, the case would come before us on appeal. In this case, however, the majority, in effect, give their conclusions of law before trial and appeal.



Quite apart from giving the trial court an opportunity to fulfill its role in arriving at a decision, the majority, in their advisory opinion, misconstrue, I believe, the May 8th press release and Rule 135.

There should be little doubt that if the May 8th agreement had been misstated, a suit, alleging misrepresentation and fraud, would be before us. And yet any omission of the all important terms proposed would have been materially misleading. The exchange was to be for "Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." This was "the basis upon which the exchange is proposed to be made," Rule 135(c)(4). The "offer to sell" exemption required this information. The most important element of "basis" was, of necessity, some indication as to value. $80 in cash needed no evaluation; the package of securities, not then final, had to have some equivalent measure. To say, as does the majority, that the "announcements that the package of securities offered by Bangor Punta would be valued at $80 oversteps the exemption and, therefore, makes the press release an offer to sell," turn a preliminary and informative press release, which advises the public of a forthcoming registration statement, into a prospectus would—or at least should—come as a shock to the S.E.C.

As to the stock purchases by Bangor Punta during its exchange offer, the age-old question is again presented: does a rule or statute merely codify an existing decision-made rule of law or does it create a new rule? The very fact that Rule 10b-6 was to be quite prospective in operation is rather convincing that the latter is the proper conclusion.

In summary, I would affirm on the only issue before us, the denial of a preliminary injunction, and would withhold

any other opinions until we have an opportunity to pass upon such future appeal as may come before us in this case.

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ANDERSON, *Circuit Judge* (concurring):

I concur in the affirmance of the order of the District Court, and in Judge Waterman's discussion of Rule 10b-6. I also concur in the holding that on May 8, 1969, the appellees were neither required nor permitted to disclose more than the fact of Bangor Punta's commitment to make an exchange offer of its securities to the Piper shareholders as part of an agreement to purchase the holdings of the Piper insiders, since the titles of Bangor Punta securities and the basis or ratio of this exchange were not yet established. For the reasons there expressed, the policies of regulation common to the federal securities laws require this resolution of the conflict between openness and reticence in disclosing specific details which is implicit in the dictates of the Securities Exchange Act of 1934 and the Securities Act of 1933.

I would not concur, however, in any interpretation of the opinion which might be thought to suggest that disclosure of information relating to the $80 valuation estimate, specified in the insiders' sale agreement, would not be required under any circumstances because it would fail to satisfy the 1934 Act's standard of materiality, regardless of whether supervening restrictions of the 1933 Act are applicable. As Chief Judge Lumbard's dissent notes, the additional fact that Bangor Punta had committed itself to offer securities valued by a well-known investment banking firm at not less than $80 per Piper share, and to back this commitment with a conditional guarantee of the value of the securities already offered to the Piper insiders, might fall within the investor-oriented definition of materiality set out in relation to disclosure required by §10(b) of the 1934 Act and Rule 10b-5 in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2 Cir. 1968), cert. denied sub nom. *Coates* v. *SEC*, 394 U.S. 976 (1969). The Court's holding, in which I concur, is simply that the possible application of disclosure principles discussed in that case is here "outweighed by the danger that substantial numbers of investors were misled by the figure's publication" in a manner violating Rule 135.



Were it necessary to consider the application of materiality tests to the $80 value term, the fact could not be overlooked that Rule 10b-5 applies to the disclosure of all material "information," 401 F.2d at 848, a category of data which may include some "matters which do not fall tidily into either the 'fact' or 'opinion' class." A. Bromberg, *Securities Laws: Fraud—SEC Rule 10b-5*, §7.4(6)(d), p. 187 (1969). But this case does not turn upon either the validity of the distinction between a material "event" and a mere "prediction or opinion" suggested in SEC Release No. 5009 (Oct. 7, 1969), or upon its application to these facts.

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LUMBARD, *Chief Judge* (dissenting):

I dissent.

Although I agree with the majority's conclusion that a preliminary injunction is not warranted in this case, I cannot accept the interpretation given by my colleagues to those provisions of the securities laws invoked against Bangor Punta. In my view Judge Tenney was substantially correct in his rulings below, and his order should be affirmed.

This case turns on two events, the issuance of the May 8 press release and Bangor Punta's purchases of 120,200

shares of Piper stock from May 12 through May 24. I think that Bangor Punta acted properly in both situations. Not only was the May 8 release proper, but the parties could have done no less, for I read recent interpretations of the securities laws as imposing an affirmative obligation to disclose the matters announced in the release. As to the purchases of the 120,200 shares, Bangor Punta did not then know of any rule or interpretation precluding the transactions, and the Commission has at least twice passed up opportunities to enforce its "long-established" interpretation of 10b-6 against Bangor Punta. Although it was aware of the purchases when it was preparing its suit in the District Court for the District of Columbia, the SEC made no mention of them in the pleadings nor sought to enjoin Bangor Punta from further purchase in the consent decree. Later, the Commission approved Bangor Punta's registration statement without requiring any disclosure of alleged violations of 10b-6. For the SEC now to take the position that Rule 10b-6 prohibited the purchases represents a complete reversal of the position it had taken towards Bangor Punta until now.

1. *Section 5(c) and Rule 135*

It was entirely proper for Bangor Punta to enter into the May 8th agreement with the Piper family, as the family had every right to choose between takeover by Chris-Craft, Bangor Punta, or any other group.

Bangor Punta agreed to use its best efforts to acquire more than 50% of the Piper Common Stock. As "a part of such best efforts," it promised to "take all steps necessary to make a further exchange offer to all holders of Piper Stock . . ."; each share was to be exchanged for Bangor Punta securities or cash "having a value, in the written opinion of the First Boston Corporation, of $80



or more . . . ." There was a similar provision to safeguard the Pipers in that they would received consideration worth at least $80. Thus, as they well may have had a right to expect, the other shareholders of Piper were assured substantially equal treatment to that received by the Piper family. See *Perlman* v. *Feldmann,* 219 F.2d 173 (2d Cir. 1955); Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 Harv. L. Rev. 505 (1965).

Bangor Punta and Piper immediately notified the Stock Exchange of this agreement and issued a press release on May 8. I think Judge Tenney was correct in holding that the press release was consonant with the exchange guidelines for announcing material corporation developments and with the mandate of *SEC* v. *Texas Gulf Sulphur,* 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

In *Texas Gulf,* we reiterated our view that the securities laws should advance "the justifiable expectation of the market place that all investors trading on impersonal exchanges have relatively equal access to material information . . . ." 401 F.2d at 848. It seems clear that if this principle is to be honored, the agreement with forty members of the Piper family, in conjunction with the decision to launch a tender offer, was material information requiring disclosure.

The majority intimates that the $80 figure was not a material fact, a suggestion with which I cannot agree. The test for materiality laid down in *Texas Gulf* is whether the fact is one to which "[a] reasonable man would attach importance . . . in determining his choice of actions in the transaction in question." 401 F.2d at 849. On May 8 Chris-Craft was offering $65 for each Piper share in a taxable exchange; no reasonable man holding Piper shares on that date would find "unimportant" the fact that Bangor

planned to offer, in the near future, a considerably more attractive package of securities, with a value of approximately $80.

To me, however, finding the fact material does not in every case compel disclosure, for the need for equal access to information does not automatically override competing policies of the securities laws as embodied in other statutory provisions and well-established regulations. Here, Rule 135 advances the basic principle that the prospectus and registration statement shall be the primary source of information during and before a contemplated offering, and only limited kinds of information can be released prior to filing.

The task of harmonizing regulations based on competing policies should of course be left to the SEC in the first instance. But when, as here, the Commission refuses even to recognize the existence of a conflict, we must strike the balance. Fortunately, our task here is not difficult, for there is language in Rule 135 which when read in the light of *Texas Gulf* authorizes the announcement.

Most of the May 8th announcement—the fact of the offering, the proposed date—was clearly authorized by Rule 135. While the $80 figure may seem more difficult to justify, under the circumstances its announcement was the only course open to Bangor Punta. Responding to the problem of valuation, Rule 135(c)(4) provides for notification of "the basis upon which the exchange is proposed to be made. . . ." Although not free from doubt, in the light of *Texas Gulf* I would read this provision as permitting announcement of the $80 figure.

The need for fair and equal access to information about the terms of a tender offer must be balanced against premature and incomplete disclosure of a securities offering in



contravention of the registration and disclosure requirements underlying the 1933 Act. The conflict is sharply posed when, as here, the merger agreement sets only a value for the exchange package, with the underlying securities left to be determined later. When the securities to be offered are not specified at the time of the announcement, the investing public cannot even begin to make an independent evaluation of the offer[1] and perforce may tend to react significantly but blindly to the unsupported dollar sum. Also, I realize there is a possibility for abuse, with companies employing this manner of agreement in order to gain the advantages of "jumping the gun."

Despite these considerations, it seems to me that here the need for disclosure was paramount. In addition to the forty members of the Piper family and their agents, a large group of persons employed by independent firms, including accountants, escrow agents, banks, and printers, would of necessity work on the Piper agreement and so learn of the news. Not bound as insiders[2] or by the restraints of corporate trust imposed on employees of Piper and Bangor Punta, they would be free to trade upon this information, and with Piper trading at a considerably lower price on May 8, their response is easily foreseen. Even if under some legal or moral duty of restraint, a group this large could not be effectively policed or controlled. Further, the figure would rapidly spread; a dollar sum speeds the rumor

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[1] This situation must be distinguished from an agreement stipulating that the undetermined securities are to have a certain cash value. This can occur when the tendering company promises to offer only widely traded securities in its package; then, the market price of widely traded securities as of the date the exchange becomes effective determines the exchange ratio. There, the public is fully protected, and I can see no arguments against full and immediate disclosure.

[2] The status of "insiders" as to all these people has not yet been established and would raise difficult questions of enforcement.

as it is easily remembered and easily transmitted. Finally, Piper stockholders, thus apprised by the May 8 release of what they might receive if they held their shares rather than tendering to Chris-Craft, clearly benefited from the disclosure.[3] Chris-Craft can hardly complain that it was placed at a disadvantage by reason of Bangor Punta's higher bid and its ability to pay more; thus the law of the market place benefits the stockholders whose shares are sought.

On petition for rehearing, another factor compelling disclosure has been called to our attention. The so-called "tender offer" provision, section 13d-1 of the Securities Act of 1934, required Bangor Punta to file a detailed description of the May 8 agreement with the SEC within ten days, by May 18th. When timely filed, the description in accordance with section 13d-1 disclosed as an essential element of the Agreement that Bangor Punta planned a registered offer to the public shareholders of Piper, the offer to consist

> "of cash and/or securities having a value of at least $80 per share. Such value to be determined by The First Boston Corporation . . . ."

This wording is virtually identical to the May 8 announcement.

The 13d-1 statement was placed in the public files of the Commission, a repository over which, it is not unreasonable to assume, the keener investment houses maintain a close scrutiny. Thus, even if it be assumed that no "leaks" of the sort described above would have occurred, sophisticated investors within a few days would have obtained the $80 figure merely by a careful perusal of public records. The policies behind *Texas Gulf* command that such imper-

[3] Indeed, if the price had not been announced, a Piper stockholder who tendered his shares to Chris-Craft during the interim might well have grounds for an action against Bangor Punta and Piper.



fect dissemination be corrected by broad disclosure through the public media, and Rule 135 must be read so as to permit such a course of action.

It is one thing to recognize the competing considerations and attempt to find a balanced solution and quite another to state flatly, as does the SEC, that the companies are under no duty to disclose. In its *amicus* brief, the Commission argues that Piper and Bangor Punta had no duty even to announce the fact of the agreement, let alone the price, since neither they nor any of their insiders were going to trade in the shares involved. I find this position wholly unrealistic and hardly designed to protect the other Piper stockholders. Simply put, Bangor Punta and Piper realized they were faced with one of "those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if [the extraordinary situation is] disclosed." *SEC* v. *Texas Gulf Sulphur,* 401 F.2d 833, 848. Disclosure was required.

Unlike the SEC, the New York Stock Exchange has tried to chart a course which accommodates the competing considerations. A Stock Exchange Rule adopted on July 18, 1968 in the wake of *Texas Gulf* in part provides:

> Negotiations leading to acquisitions and mergers, stock splits, the making of arrangements preparatory to an exchange or tender offer . . . are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans is most likely to occur. . . .
>
> At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions. . . . Experience has shown that maintaining security at this point is virtually impossible. Accord-

> ingly, fairness requires that the Company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to "outsiders."
>
> The extent of the disclosures will depend upon the state of discussion, studies, or negotiations. So far as possible, public statements should be definite as to price, ratio, timing and/or any other pertinent information necessary to permit a reasonable evaluation of the matter. As a minimum, they should include those disclosures made to "outsiders" . . . .

NYSE Company Manual A-19 (July 18, 1969) (Addendum at 19-20). This standard seems to me a realistic solution to the problem.

I would hold that the May 8 announcement was proper, reflecting a fair accommodation of Section 5(c) and Rule 135 and the obligation to disclose material facts.

### 2. *Rule 10b-6*

Nor would I find that any violation of Rule 10b-6 was occasioned by Bangor Punta's purchases of 120,200 shares of Piper stock between May 14 and May 23. To reach these transactions, the majority would stretch the wording of 10b-6 beyond anything that courts, commentators, and—in published actions—the SEC had considered included until this case.

Rule 10b-6 seeks to prevent the manipulation of the price of shares which are the subject of a current or impending public offering. It is concededly a highly technical rule, and, as the Commission explicitly noted at its adoption, it covers only a limited number of undesirable practices:

> The Rules [10b-6, -7, -8] do not purport to cover every possible type of manipulation or deceptive activity.



> The fact that a particular activity is not specifically dealt with or prohibited in such rules does not necessarily mean that it is not unlawful under the Act or the Commission's other rules.

SEC Securities Act Release No. 5194 (July 5, 1955). The practice particularly condemned is the offering company purchasing its own shares on the market, thereby buoying up the market price close to that set in the public offering. As is so often the case in the field of securities laws, there are a host of other, closely related transactions having the same manipulative effect on the tender offer which are also barred by the Rule. For example, section (b) controls the situation where the offering in prospect involves warrants; there, the issuer cannot purchase those of its shares represented by the rights. It seems to me improper to extend this sort of technical, limited and consistently interpreted rule to a common practice which until now has never been thought within its ambit.

As an original matter, it might be desirable to prohibit a tendering company from purchasing the target company's shares, but the proper way to accomplish this end, taken by the Commission with its new Rule 10b-13, is to adopt a new rule rather than stretch an established one beyond its recognized bounds. The Commission, however, seems not to have been content to wait until 10b-13 became effective to enforce its new policy. Rather, it invoked 10b-6 during the interim by a boot-strap operation, claiming in the release announcing 10b-13 that the proposed rule was "in effect, a codification of existing interpretations under Rule 10b-6. . . ." I sympathize with the Commission's dilemma when, having announced a new policy, it cannot reach current transactions until the new rule becomes effective. But it seems to me that the cost of waiting will rarely be too great as the Commission presumably has lived with the

offending practice for years; it expects us to make bad law to bail it out.

My belief that 10b-6 is being invoked here merely as a stop-gap measure is strengthened by several factors. Although the Commission claims that its position reflects consistent staff practice, I have found no published interpretations, either administrative or judicial, before the Release accompanying proposed Rule 10b-13 that indicate the Commission's view that 10b-6 reaches the shares of a target company. And discussions of the phrase "rights to purchase any such security" and of section 10b-6(b) by the commentators have been directed exclusively to the situations involving two securities of the same company, such as the distribution of a convertible debenture coupled with purchases of the underlying security. *See, e.g.*, Comment, The SEC's Rule 10b-6: Preserving a Competitive Market During Distributions, 1967 Duke L.J. 809, 831; Disclosure Requirements of Public Companies and Insiders 138-42 (Flom, Garfinkel & Freund ed. 1967).

Significantly, the SEC did not see fit to apply its interpretation of 10b-6 to Bangor Punta, although it knew of the May purchases.[4] The final paragraph of the consent

[4] It may well be that the Commission's course of action was prompted by internal confusion. While Chris-Craft was warned on April 7th that the Commission would consider purchase of Piper stock while its tender offer was pending a violation of 10b-6, no such warning was ever communicated to Bangor Punta. When Chris-Craft abided by this prohibition, the Commission may have felt that its error had given Bangor Punta an inequitable advantage which it ought to seek to correct by the position it has taken in its amicus brief. I do not feel, however, that Bangor Punta—an equally innocent party—should be made to suffer for any failure on the part of the Commission or its staff. In any event, Bangor Punta acted within the law and consistent with the rulings of the SEC with respect to Rule 10b-6.



decree, entered on May 26, does not prohibit Bangor Punta from acquiring Piper stock other than through the exchange offer. Nor did the SEC require Bangor Punta to include an appropriate disclosure in its prospectus, as it clearly had the power to do,[5] of an alleged violation of its Rules, although Bangor Punta did mention the May purchases. Thus, I feel the SEC's own conduct casts doubt on its claim that "the Commission's staff has so construed the rule in similar situations."

Rule 10b-6 has until this case been a limited, highly technical rule. Despite the fact that a change in Commission policy cannot be put into effect for several months because of the procedural safeguards of the Administrative Procedure Act, the Commission now claims that we must reach the same result by accepting its interpretation, i.e., that the rule has meant this all along. I cannot believe that this practice is consonant with the standards of due process and elemental fairness long engrained in the operation of administrative law.

Since I conclude that Bangor Punta's purchases do not fall within the ambit of Rule 10b-6 as consistently interpreted and universally understood as of May, 1969, and I do not believe the May 8th announcement was in violation of the securities laws, I would affirm Judge Tenney's opinion below.

[5] *See, e.g.*, Northwest Industries Registration Effective, SEC News Digest, Issue No. 69-73 (April 17, 1969).

**CHRIS-CRAFT INDUSTRIES, INC.,**
**Plaintiff,**

**v.**

**PIPER AIRCRAFT CORPORATION**
**et al., Defendants.**

**No. 69 Civ. 2227.**

United States District Court
S. D. New York.
Aug. 19, 1969.

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Chadbourne, Parke, Whiteside & Wolff, New York City, Donald L. Deming, Richard B. Leather, Zachary Shimer, New York City, of counsel, for defendant Piper Aircraft Corp. and individually named members of Piper family.

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, New York City, James V. Ryan, New York City, William L. D. Barrett, Nancy Pasley, of counsel, for Bangor-Punta Corp.

## OPINION

TENNEY, District Judge.

The instant suit arises out of the protracted and often bitter contest between plaintiff Chris-Craft Industries, Inc. (hereinafter referred to as "Chris-Craft") and defendant



Bangor Punta Corporation (hereinafter referred to as "Bangor Punta") to gain control of defendant Piper Aircraft Corporation (hereinafter referred to as "Piper"). Alleging various violations by defendants of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the Rules promulgated with respect to each such Act, Chris-Craft seeks an injunction *pendente lite* restraining Bangor Punta from: (1) accepting 107,574 shares of Piper common stock tendered by the public shareholders of Piper to Bangor Punta pursuant to the terms of Bangor Punta's General Exchange Offer of July 18, 1969. Chris-Craft urges that these shareholders be given the opportunity to rescind their tenders after a "full and fair disclosure" has been made of the terms of Bangor Punta's exchange offer; (2) acquiring additional shares of Piper; (3) effecting a merger or consolidation of Bangor Punta and Piper; and (4) voting 120,200 shares of Piper purchased in May 1969 by Bangor Punta in five large cash transactions, effected neither on a securities exchange nor from or through a broker or dealer.

Piper is a publicly-held Pennsylvania corporation whose capital stock consists of 5,000,000 authorized shares of $1.00 par value common stock, of which approximately 1,641,890 shares are issued and outstanding. The Piper family, three of whom are members of Piper's Board of Directors and defendants herein, own approximately 501,090 of the 1,641,890 outstanding shares. Piper's stock has been listed on the New York Stock Exchange (hereinafter referred to as "the Exchange") since 1957.

Chris-Craft is a diversified manufacturer whose common and preferred stock and convertible debentures are traded on the Exchange. Bangor Punta is a publicly-held diversified corporation whose stock and bonds are also listed on the Exchange.

In January 1969 Chris-Craft, in an effort to gain control of Piper, began acquiring shares of Piper on the open market. On January 23, 1969, Chris-Craft publicly announced its interest in Piper and made a public tender offer for up to 300,000 shares of Piper stock at $65.00 per share with the "right to purchase excess shares."

Piper's Board of Directors, by letter dated January 27, 1969, advised Piper stockholders that in their opinion Chris-Craft's offer was inadequate and not in the best interests of Piper shareholders. Unsatisfied with the history of Chris-Craft's management, Piper's management and Board of Directors decided that the best interests of Piper and its shareholders required them to resist this attempted takeover.

On January 30, 1969, the Board of Directors of Piper and the Grumman Aircraft Engineering Corporation (hereinafter referred to as "Grumman") approved an agreement whereby Piper would sell 300,000 of its authorized but unissued shares to Grumman for $65.00 per share, in contemplation of thereafter exploring the possibility of a merger with Grumman. This agreement, although never realized, adversely affected Chris-Craft's cash tender offer, which expired on February 3, 1969.

On February 27, 1969, Chris-Craft filed a proposed registration statement and prospectus with the Securities and Exchange Commission (hereinafter referred to as "the SEC") in which it proposed to offer to exchange certain Chris-Craft securities for up to 300,000 shares of Piper.

Pursuant to its continuing efforts, on March 24, 1969 Piper issued 320,000 shares of its authorized but unissued common stock in exchange for all the outstanding stock of the United States Concrete Pipe Company of Florida, a subsidiary of a publicly-held investment company listed



on the Exchange. At the same time, Piper exchanged 149,199 shares of its authorized but unissued common stock for approximately 99½ percent of the outstanding shares of Southply, Inc., a closely-held Louisiana corporation. The Board of Governors of the Exchange, with whom listing applications covering the issued shares were filed, felt that the distribution of almost 30 percent of Piper's authorized stock violated the Exchange's listing criteria. Accordingly, trading in Piper stock was suspended and delisting proceedings authorized. When Piper's management agreed to rescind these transactions, trading in Piper stock was resumed.

While Piper's prolonged efforts to fend off Chris-Craft raise serious questions as to the propriety of such conduct, this action has little relevance to the instant proceedings. For the issues raised herein relate solely to Bangor Punta's exchange offer of July 18, 1969 and its purchases, for cash, of Piper stock in May 1969.

In early January 1969, defendant First Boston Corporation (hereinafter referred to as "First Boston"), an investment banking firm which serves as financial adviser to Piper, inquired whether Bangor Punta was interested in a possible acquisition of Piper. Although Bangor Punta responded affirmatively, nothing developed at that time. At a meeting convened on February 24, 1969, Bangor Punta explained that it would not consider attempting such an acquisition unless the Piper family sold their 501,090 shares to Bangor Punta. This condition was finally accepted by the Piper family on April 22, 1969.

On May 7, 1969, Chris-Craft publicly announced the terms of its then pending registration statement which proposed an exchange offer of Chris-Craft stock for 300,000 to 400,000 shares of Piper. The following day, after pro-

tracted discussions with Piper's representatives, a final agreement was entered into pursuant to which the Piper family agreed to exchange their shares for *specified* Bangor Punta securities. Additionally, the agreement provided that Bangor Punta would use its best efforts to acquire more than 50 percent of the outstanding shares of Piper stock. As part of those best efforts, Bangor Punta agreed to make an exchange offer to all other holders of Piper stock "under which such holders will be entitled to exchange each share of Piper common stock held by them for Bangor Punta securities and/or cash having a value, in the written opinion of The First Boston Corporation, of $80 or more." The agreement further provided that if Bangor Punta succeeded in acquiring more than 50 percent of the outstanding Piper shares, and if, in the written opinion of First Boston, the value of the shares offered to the members of the Piper family was less than $80.00 on the opening day of the exchange offer, Bangor Punta would deliver to the members of the Piper family securities and/or cash with a value "equal to the difference between $80 and the Exchange Offer Value." No agreement had been reached at that time as to the components of the proposed package of Bangor Punta securities to be offered to the public Piper shareholders.

Later that same day, Bangor Punta and Piper issued identical press releases announcing that they had reached an agreement under which Bangor Punta would acquire the Piper family's interest in Piper and that:

> "Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share."



At that time, Piper stock was selling on the Exchange at approximately sixty dollars.[1]

On May 26, 1969, the SEC instituted an action against Bangor Punta and Piper in the United States District Court for the District of Columbia. Therein, the SEC charged that the May 8th press release was "gun-jumping" in violation of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c),[2] and SEC rule 135. Without admitting any of the allegations of the complaint, Bangor Punta and Piper consented to the entry of a final judgment of permanent injunction which enjoined them, *inter alia,* from offering to sell or from selling either of their securities until a registration statement was filed with the SEC as to such securities.

Bangor Punta filed its registration statement with the SEC covering its exchange offer on May 29, 1969. Included in the filing, as an exhibit to the registration statement, was a copy of the agreement of May 8, 1969. Preliminary prospectuses in the form contained in the registration statement were sent by Bangor Punta to all Piper shareholders of record on the same day the registration statement was filed. It became effective on July 18, 1969 and expired on July 29, 1969.

Bangor Punta now owns 728,864 shares of Piper, or 44.4 percent of its outstanding stock. As a result of its

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[1] Affidavit of John E. Flick, dated August 4, 1969, at 10.

[2] Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c), provides:

> "It shall be unlawful for any person, directly or indirectly * * * to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security * * *."

most recent exchange offer, which terminated on August 4, 1969, Chris-Craft has now acquired a total of at least 654,000 shares of Piper, or approximately 39.8 percent of its outstanding shares. With approximately 259,026 shares of Piper still in the hands of the public, it would appear that at this time neither Chris-Craft nor Bangor Punta has succeeded in gaining control of Piper.

[1] Chris-Craft argues that the May 8th identical press releases of Bangor Punta and Piper constituted flagrant violations of Section 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77e(c) and SEC Rule 135, 17 C.F.R. § 230.135, in that no registration statement had been filed with the SEC prior thereto.

Until the actual execution of the May 8th agreement, only top management personnel and their confidential advisors had been advised of the negotiations with Piper. Upon execution, however, it became necessary to involve a great many other persons in the arrangements, such as an indenture trustee, independent auditors, printers, outside counsel and stenographers. Maintenance of security against premature disclosure of the terms of agreement became virtually impossible.[3] Since the $80.00 figure set by the terms of the agreement was substantially above the market price for a share of Piper stock, the opportunity for stock manipulations and unfair dealings in Piper stock by those who may have learned of the agreement prior to its becoming public knowledge was apparent. The May 8th press release would therefore appear both desirable and consonant with the directives of Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* Coates v. Securities & Exch. Comm'n, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969). Further,

[3] *Supra* note 1 at 9.



the guidelines for press releases issued by the Exchange on July 19, 1968 support this policy of timely disclosure.

> "Negotiations leading to acquisitions and mergers, stock splits, the making of arrangements preparatory to an exchange, or tender offer, • • • are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans is most likely to occur. Frequently, these matters require discussion and study by corporate officials before final decisions can be made. Accordingly, extreme care must be used in order to keep the information on a confidential basis.
>
> "Where it is possible to confine formal or informal discussions to a small group of the top management of the company or companies involved and their individual confidential advisors where adequate security can be maintained, premature public announcement may properly be avoided. • • •
>
> "At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions, e. g., business appraisals, tentative financing arrangements, attitude of large outside holders, availability of major blocks of stock, engineering studies, market analyses and surveys, etc. Experience has shown that maintaining security at this point is virtually impossible. Accordingly, *fairness requires that the Company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to 'outsiders.'*
>
> "The extent of the disclosures will depend upon the stage of discussion, studies, or negotiations. So far as possible, public statements should be definite as to *price,* ratio, timing and/or any other pertinent information

necessary to permit a reasonable evaluation of the matter. As a minimum, they should include those disclosures made to 'outsiders'." (Emphasis added.) New York Stock Exchange Company Manual at A–19 (July 19, 1968).

Section 5(c) of the Securities Act of 1933 makes it unlawful for any person directly or indirectly, to offer to sell or offer to buy any security unless a registration statement has been filed as to such security. The May 8th press release, however, merely asserts that Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper for a package of Bangor Punta securities. On its face, this press release cannot itself be construed as an offer to sell or buy securities. This view is supported by SEC Rule 135, which, in pertinent part, provides:

"(a) For the purposes only of Section 5 of the Act, the following notices sent by an issuer in accordance with the terms and conditions of this rule shall *not* be deemed to offer any security for sale:

• • • • • •

"(2) A notice to any class of security holders of such issuer or of another issuer advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders • • •." (Emphasis added.)

Chris-Craft argues further than in addition to Section 5(c) and Rule 135, Rules 10b–5, 17 C.F.R. § 240.10b–5, and 10b–6, 17 C.F.R. § 240.10b–6, forbid a person making an exchange offer from placing a value on the securities being



offered, since any opinion as to value might be self-serving and misleading.

SEC Rule 135 provides that "(a) notice to any class of security holders • • • advising them that it proposes to offer its securities to them in exchange for other securities presently held by such security holders • • • shall contain • • • the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, [and] the basis upon which the exchange is proposed to be made • • •."

Since, as previously noted, the precise components which were to comprise the package of Bangor Punta securities to be offered for each share of Piper had not been determined at the time of the May 8th press release, Bangor Punta and Piper could do no more than set forth the basis upon which the exchange offer was proposed in the same terms as contained in the May 8th agreement. Additionally, since the Exchange's guidelines for press releases prescribed that "[s]o far as possible, public statements should be definite as to price, ratio, timing and/or any other pertinent information necessary to permit a reasonable evaluation of the matter", the reference to the $80.00 figure cannot be deemed unjustified.

Nor can it be said, as Chris-Craft urges, that Piper and Bangor Punta have, by means of the May 8th press release and the latter's preliminary and final prospectuses, deliberately misled the public into believing that Bangor Punta would, in exchange for each share of Piper, tender securities immediately salable for $80.00, in violation of Sections 9, 10(b) and 14(e) of the Securities Exchange Act of 1934 as amended 15 U.S.C. § 78i, 15 U.S.C. § 78j(b), 15 U.S.C. §78n (e), respectively, and of the rules promulgated with respect to each such Act.

On July 18, 1969, First Boston rendered a formal opinion to Bangor Punta and Piper that based on the market and other conditions existing prior to the opening of business on July 18, 1969, the combination of securities provided for in the general exchange offer outlined in the registration statement had a value of not less than $80.00.

Such a determination, of course, is normally not a mechanical task but is essentially a matter of judgment. This evaluation was arrived at by a committee of eleven experienced and knowledgeable personnel. In reaching its collective judgment, the committee met on two different occasions to consider all the facts they deemed relevant. Additionally, over six weeks were spent in preparing the material upon which the committee relied.[4] No persuasive argument has been presented to the effect that the value placed on the package of Bangor Punta securities by First Boston was not reached in good faith. Surely, there is no basis for implying from the May 8th press release that such value would endure for the duration of the exchange offer, or be immediately realizable on any particular day. The vagaries of the marketplace belie such a construction. The value placed on the package may vary from buyer to buyer and from day to day. With this in mind, Bangor Punta specified at two places in its final prospectus, at the insistence of the SEC, that:

> "No guarantee of, or representation as to, the value of the securities offered by Bangor Punta pursuant to the Exchange Offer is or can be made."

"Clear misleading statements need be shown • • • before this court can enjoin a tender offer. • • • In the instant case the plaintiffs have failed to show clear misleading representations in the tender offer or the absence of statements in the tender offer which in combination with other representations would lead to a conclusion that fraud was being perpetrated upon unsuspecting shareholders." Jacobsen Mfg. Co. v. Sterling Precision Corp., 282 F.Supp. 598, 603 (E.D.Wis.1968); Fleischer and Mundheim, Corporate Acquisition by Tender Offer, 115 Penn.L.Rev. 317, 338 (1967).

[2] Chris-Craft's contention that the letters of June 4 and June 20, 1969, sent to all Piper shareholders by W. T. Piper, Jr., Chairman of the Board of Directors and President of Piper, urging acceptance of the Bangor Punta exchange offer, violated Section 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78n(e), in failing to disclose that the Piper family might obtain additional securities if Bangor Punta was successful in gaining control of Piper, is unsound. This adjustment, provided for in the agreement of May 8th, was designed to compensate the Piper family for having fixed its exchange package more than two months prior to the effective date of the exchange offer and at a lower value than the initial package offered to the public. Simply put, it merely provided protection for the Piper family should the market value of the securities they were to receive be less than the value of the securities offered to other Piper shareholders. Realistically, I cannot say that there is a substantial likelihood that but for this omission in the letters of June 4 and June 20, 1969, a Piper shareholder would have accepted the Chris-Craft exchange offer rather than the Bangor Punta exchange offer. See General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 162 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026, 89 S.Ct. 631, 21 L.Ed.2d 570 (1969).

A copy of the agreement of May 8th, which contained this provision, was filed with the SEC on May 29, 1969, as

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[4] Affidavit of John S. Buckley, dated August 4, 1969, at 2.

an exhibit to the registration statement. Further, James J. Rochlis and C. Leonard Gordon, officers and directors of Chris-Craft, explained this provision in detail in a letter sent to all Piper shareholders prior to the issuance of Bangor Punta's final prospectus. At the suggestion of the SEC, reference to the possibility that the Piper family's package might be increased in the event Bangor Punta obtained control of Piper was printed on the cover page of Bangor Punta's final prospectus.[5] "Surely stockholders, once informed of the facts, have a right to make their own decisions in matters pertaining to their economic self-interest, whether consonant with or contrary to the advice of others, whether such advice is tendered by management or outsiders or those motivated by self-interest." American Crystal Sugar Co. v. Cuban-American Sugar Co., 276 F.Supp. 45, 50 (S.D.N.Y.1967).

[3] Rule 10b-6, 17 C.F.R. § 240.10b-6, provides that it shall constitute a "manipulative or deceptive device or contrivance" under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), for an underwriter to purchase securities while he is still participating in their distribution.[6] R. A. Holman & Co. v. Securities & Exch. Comm'n, 366 F.2d 446 (2d Cir. 1966), *opinion amended on rehearing,* 377 F.2d 665 (2d Cir.), *cert. denied,* 389 U.S. 991, 88 S.Ct. 473, 19 L.Ed.2d 482 (1967), *rehearing denied,* 389 U.S. 1060, 88 S.Ct. 767, 19 L.Ed.2d 867 (1968). Manipulation was one of the basic evils with which Congress was concerned in enacting statutes to regulate the securities market. See

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[5] Affidavit of John J. Martin, dated August 4, 1969, at 4-5.

[6] "Distribution" comprises "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public." Lewisohn Copper Corp., 38 S.E.C. 226, 234 (1958).



Section 2(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78b(3). Manipulation was often accomplished by those about to sell securities or already engaged in selling them, bidding on the market for the same securities, thereby creating an unjustifiable impression of market activity which would facilitate the sale at artificially high prices. As was noted in Securities & Exch. Comm'n v. Scott Taylor & Co., 183 F.Supp. 904, 907 (S.D.N.Y.1959): "This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is *the* practice which is covered by Rule X-10B-6." (Footnotes omitted.) (Emphasis added.) Weitzen v. Kearns, 271 F.Supp. 616, 623 (S.D.N.Y.1967); Securities & Exch. Comm'n v. Electronics Security Corp., 217 F.Supp. 831, 836 (D.Minn.1963). Bangor Punta's cash purchases of 120,200 shares of Piper in five transactions in May 1969, effected neither on the Exchange nor from or through a broker or dealer, were obviously not designed to place market pressures on the distribution price of Piper, so as to create an artificially high price for this security. Any increase in the price of Piper shares as a result of these transactions would obviously serve only to make Bangor Punta's exchange offer appear less desirable to Piper shareholders.

The SEC has recently proposed Rule 10b-13, which would prohibit a person making a cash tender or exchange offer for any equity security from purchasing such securities otherwise than pursuant to the cash tender or exchange offer. Although the release states that this new Rule is, in effect, a codification of existing interpretations under Rule 10b-6,[7] this Court has been unable to find, and has not been referred to, any support therefor. Moreover, the recent decision in Armour & Co. v. General Host Corp., 296

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[7] Release No. 34—8595, May 5, 1969, CCH § 77,706.

F.Supp. 470, 476 (S.D.N.Y.1969), would appear to the contrary.

> "[S]ubstantial legal issues exist whether Rule 10-b(6) is applicable at all to the instant transactions. The principal question is whether subsection (b) of the Rule applies to the stock of the 'target' corporation [Piper], as well as that of the distributor."

Finally, in considering Chris-Craft's contentions that Bangor Punta and Piper have violated the terms of the final judgment of permanent injunction in making various statements which have been attributed to them by the press, it is well to remember that such episodes may reflect "the difficulties commonly experienced in answering skilled and energetic reporters who seek more definiteness than there is, and the frailties inevitable in human communication * * *." Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 951 (2d Cir. 1969). This, of course, would appear especially true when both Piper and Bangor Punta have expressly denied ever making such statements.[8]

It has been frequently noted that a preliminary injunction is an extraordinary equitable remedy which will be granted only upon a showing by the applicant therefor that it will probably succeed on the trial and that it will suffer irreparable injury if the defendant is not restrained from certain activity pending trial. American Metropolitan Enterprises of N. Y., Inc. v. Warner Bros. Records, 389 F.2d 903 (2d Cir. 1968), and the cases cited therein; Clairol Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968) (preliminary injunction will not be granted except upon a clear showing of probable success).

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[8] Affidavit of Donald L. Deming, dated August 4, 1969, at 16; *supra* note 1 at 14-15.



[4] As previously noted, both the Chris-Craft and Bangor Punta exchange offers have expired. Neither party has gained control of Piper, and both are still in a position to do so. Although a finding by the trial court that plaintiff will ultimately prevail on the merits is not required before issuing a preliminary injunction when, as here, there would appear to be a lack of an adequate showing of irreparable damage, the party seeking a preliminary injunction has the burden of convincing the trial court with reasonable certainty that it will succeed upon the trial. Unicon Management Corp. v. Koppers Co., Inc., 366 F.2d 199, 204-05 (2d Cir. 1966). To show irreparable injury, Chris-Craft must at least demonstrate that "unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired." Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966). No such showing has been made herein; nor does it appear that the "balance of hardships" tip decidedly toward plaintiff.

[5] "The historic injunctive process was designed to deter, not to punish." Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944); Hambros Bank, Ltd. v. Meserole, 287 F.Supp. 69, 72 (S.D.N.Y.1968). The conduct of Bangor Punta must be tested, as the Court of Appeals for the Second Circuit noted in both Electronic Specialty Co. v. International Controls Corp., *supra* at 948 of 409 F.2d, and Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840, 843 (2d Cir. 1967), by whether " 'any of the stockholders who tendered their shares would probably not have tendered their shares if the alleged violations had not occurred.' " After careful consideration, I cannot say that in the instant suit such would have been the case. The equities of the situation would, therefore, appear to speak against the issuance of a preliminary injunction. Armour & Co. v. General Host Corp., *supra* at 475 of 296 F.Supp.

It is not unlikely that further exchange offers to the remaining public shareholders of Piper may now be contemplated both by Bangor Punta and Chris-Craft. In this respect, then, it is wise to recall, as was noted in Sherman v. Posner, 266 F.Supp. 871, 874 (S.D.N.Y. 1966), that:

> "[N]o matter how clearly it was indicated otherwise, the issuance of the injunction undoubtedly would be viewed by some [of these Piper shareholders] as a favorable adjudication of the claims of the plaintiff. This would be tantamount to a determination of wrongdoing on the part of the * * * [Bangor Punta] management. Just how this result could be remedied in the event it was found at a full hearing that the claims of the plaintiff were unfounded is not readily perceptible to this court."

See Kauder v. United Board & Carton Corp., 199 F.Supp. 420, 424 (S.D.N.Y. 1961); Mack v. Mishkin, 172 F.Supp. 885, 889 (S.D.N.Y. 1959).

Accordingly, and for the foregoing reasons, plaintiff's motion is in all respects denied.

So ordered.

## D.


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*District Court Opinion*
*in S.E.C. v. Bangor Punta Corporation*

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*, *v.* BANGOR PUNTA CORPORATION, *Defendant.* | 70 Civ. 3940(MP) |

## FINDINGS AND OPINION

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POLLACK, *District Judge.*

POLLACK, *District Judge.*

This is one of a series of cases in this Court arising out of a contest between Bangor Punta Corporation ("Bangor Punta") and Chris-Craft Corporation for control of Piper Aircraft Company ("Piper")—a struggle in which Bangor Punta emerged, in September, 1969, with control of Piper.[1]

Here the Securities and Exchange Commission ("Commission") asks the Court to enjoin Bangor Punta from violating the Securities Act of 1933 and the Securities Exchange Act of 1934 and to order Bangor Punta to make an offer of rescission to holders of Piper stock who exchanged their shares for securities of Bangor Punta, pursuant to an exchange offer of July, 1969.

The Commission charges that Bangor Punta's registration statement and prospectus dated July 18, 1969 pertaining to the Piper exchange offer were materially deficient in omitting to disclose an alleged decision to sell Bangor Punta's 98.7% stock interest in the Bangor and Aroostook Railroad ("BAR") at a price far below its carrying value on Bangor Punta's books and financial statements.[2] The Commission further charges that Bangor Punta intentionally deferred a closing of that sale in order to avoid making and exposing the necessary write-downs until the exchange offer was completed.

Bangor Punta denies that the sale had been decided on in the June to August period that year or that there was

[1] In *Chris-Craft Corporation* v. *Bangor Punta Corporation* (69 Civ. 2227) Chris-Craft sues for damages alleging that Bangor Punta's victory was due to violations of the securities laws. Piper and Bangor Punta have cross-complained. (69 Civ. 2354 and 69 Civ. 2227)

[2] As noted *infra* the sale of BAR stock took place October 2, 1969 and was for $5 million in cash, a figure some $13.5 million below the carrying value of BAR on Bangor Punta's financial statements.



then a reasonable probability of a sale. It contends that it was not required to make any reference in the prospectus of July 18, 1969 to the sale or to any steps leading to sale.[3]

The evidence adduced upon trial established the following facts.

On or about May 29, 1969 Bangor Punta filed with the Commission a registration statement and prospectus for an offering of its securities to holders of Piper common stock in exchange for their shares of Piper. The registration statement became effective on July 18, 1969 and the prospectus was sent thereafter to all Piper shareholders. On this offering, Bangor Punta obtained 111,628 shares of Piper Aircraft or about 7% of the 1,644,790 shares of Piper Aircraft common stock outstanding.

There is no information in the prospectus suggesting consideration or pendency of a sale in June, July or August, 1959. Bangor Punta did sell its stock in BAR to Amoskeag Corporation ("Amoskeag") on October 2, 1969 at a price of $5 million in cash plus certain contingent payments later described.

The historic cost of BAR's assets, less depreciation and other accounting adjustments and less liabilities was about $29.8 million. However, the financial statements in the prospectus carry Bangor Punta's interest at $18.4 million, a figure which reflects an appraised value of the BAR shares as of September, 1965. The history of this figure is as follows:

Until 1961, BAR was an independent company. It then became a subsidiary of The Bangor and Aroostook Corpo-

[3] Bangor Punta has alleged affirmatively that the administrative staff of the Commission, to overcome its own errors and shortcomings, has engaged in a course of conduct, the intended result of which has been to interfere on behalf of and to favor Chris-Craft Corporation in its struggle with Bangor Punta for control of Piper, a struggle which has been going on since May, 1969. No proof was adduced to support this contention.

ration (the "Corporation") which had been formed as a holding company. During 1960 and 1961 the Corporation offered its securities to BAR shareholders in exchange for their BAR shares and acquired more than 98% of BAR's outstanding shares. Based on the market price of BAR shares on the New York Stock Exchange before they were delisted in 1961, the Corporation's interest was worth $8.1 million and the Corporation carried the BAR interest at this figure in its financial statements.

In 1964, the Corporation combined with Bangor Punta (a wholly-owned subsidiary of Punta Alegre Sugar Corporation). Although Bangor Punta could have shown its equity in the net assets of the BAR at $29.8 million, it elected to carry forward the figure appearing on the books of the Corporation, viz., $8.1 million. It is claimed that this was done because of a strong possibility that BAR was to be disposed of promptly. By September, 1965 that possibility had evaporated. But, instead of restating the carrying value of BAR at the amount of Bangor Punta's equity interest in BAR on a historical cost basis (which would have resulted in a carrying figure of $29.8 million) or at its or its predecessor's cost, Bangor Punta obtained an appraisal from investment banking houses with knowledge of the railroad industry. Based on their recommendation as to approximate fair market value Bangor Punta restated the BAR holding at $18.4 million—approximately $10 million less than its equity in the underlying net asset value of the railroad on an historical cost basis and $10 million more than the former carrying figure. The difference between the former carrying figure of $8.1 million and the new appraised value of $18.4 million was credited directly to Bangor Punta's earned surplus, by-passing the profit and loss account. This treatment had been the subject of inquiry



by the Commission in connection with a prior registration statement and, after explanations were made, the Commission dropped the matter.

Except for minor accounting adjustments the $18.4 million carrying value of BAR established in 1965 remained unchanged and was reflected in the 1969 registration.

Bangor Punta's management had, for some time, sought a means of separating out BAR in a way which would permit its continued operation as a railroad. Discussions to that end were held within Bangor Punta in 1967 and 1968 and continued into 1969. Several methods were speculated on: viz., the creation of a New England Railroad System by combining the BAR with the Maine Central and Boston and Maine Railroads; an acquisition of the Delaware and Hudson Corporation to combine its railroad with the BAR; a spin off of BAR or a rights offering to the Bangor Punta stockholders. Prior to April of 1969 there seemed to be no prospect of a buyer for the railroad.

On April 1, 1969 Bangor Punta appointed a committee to study the possible divestiture of BAR. The committee consisted of Curtis M. Hutchins, a director and member of the Executive Committee, Gordon Robertson, co-Chairman of the Board and Chairman of the Executive Committee, Robert G. Stone and George H. Siel, Directors of the railroad. Messrs. Hutchins and Robertson were both past presidents of the railroad. This was a highly knowledgeable group on matters pertaining to the railroad and its problems.

Some weeks after the Committee was appointed Amoskeag Company through its president, Frederic C. Dumaine, made an offer to C. M. Hutchins for the railroad of $5 million in cash. Dumaine had long and active experience in the railroad business as an operator. Amoskeag was a

registered investment company with investments in the Maine Central Railroad Company among other enterprises. Dumaine's price was merely the amount of the savings in operating expenses which he estimated could be effected if the Maine Central and BAR were combined.

Hutchins told Dumaine—in response to his query—that Bangor Punta might dispose of its interest in the railroad if the price was right. To Dumaine's offer of $5 million—for either the assets or the stock[4]—Hutchins responded that this was exceedingly low but that he would convey it to the management. Essential details—including the railroad's cash flow figures, its balance sheet and a five year forecast, both cash and profit and loss—were furnished to Dumaine at a second meeting with Hutchins. Dumaine reaffirmed his $5 million offer as his highest price. Hutchins explained that he had no authority except to explore possibilities of divestiture of the railroad; he had no power of decision.

Hutchins and the Committee members with whom he conferred concluded that sale of BAR stock to Amoskeag at the proferred price of $5 million was the "best course for Bangor Punta to pursue."

The company's independent auditors were asked about the accounting treatment which would be afforded a sale of the railroad for $5 million. On May 20, 1969 they reported that such a sale would be treated on the financial statements of Bangor Punta as an extraordinary loss of about $13.5 million.

On May 21, 1969 at a meeting of Bangor Punta's Board of Directors, Hutchins, speaking for all the members of his Committee, stated that there were three possibilities for the

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[4] Dumaine's offer soon narrowed to one for the stock only and remained such through the negotiations.



future of BAR. Bangor Punta might (1) keep the railroad as is, (2) continue to seek to merge it with another railroad, or (3) sell BAR at the best possible price. He discussed each of these possibilities. In respect of the third possibility, he stated that the only person he knew who might be interested in a purchase was Dumaine, of Amoskeag. He reported that preliminary discussions with Dumaine indicated that he might be willing to pay $5 million in cash, securities or some combination of both.

Hutchins told the Board that his Committee unanimously recommended sale at the $5 million price. He reported that over the next five years a heavy infusion of capital in the order of $5 million would be needed to break even from operations. He gave very little hope for the possibility of a merger except conceivably with the Boston and Maine Railroad, and noted that this would produce securities rather than cash for Bangor Punta. This proposal of sale was a surprise to the Board and met with the objection that the Board had insufficient information to make an intelligent decision since a great deal of accounting, tax and legal work had to be done as a preliminary matter to put the offer in proper focus.

In the course of the meeting, counter-suggestions as to price to be sought were broached by the Chairman of the Board, Nicholas M. Salgo.

Following discussion, it was the consensus of the Board that Hutchins should attempt to negotiate for a sale, at book value, of 51% of the stock of BAR and sale of the balance at a higher price with a total consideration to approximate $7 million. Hutchins was separately authorized to negotiate a sale of 100% of the BAR stock, subject to an investigation of the tax and accounting ramifications of such a transaction and subject to the approval of the

Board of Directors or of the Executive Committee of the Board of Directors.

Dumaine, informed by Hutchins of the Board's counter-suggestions, would not change his offer. Dumaine and Hutchins then drafted an unsigned letter setting forth a proposed arrangement of sale which Hutchins was to present to the Board. The draft, reciting that Hutchins was authorized only to explore the situation tentatively and that any "understanding" was subject to approval by the Board of Directors,[5] stated that Hutchins and Dumaine had agreed on the sale to Amoskeag of all the BAR stock owned by Bangor Punta for $5 million plus some additions, subject to ICC approval.

Shortly thereafter, on June 3, 1969, following Hutchins' report to a key management group of Bangor Punta, it was decided to table the entire matter until the tax impact upon Bangor Punta of a sale of assets, as compared with some other disposition of the interest, could be studied and ascertained.[6] Nothing indicated that there was any especial urgency to give the matter earlier consideration. While the divestiture of this asset was a matter of significant interest to Bangor Punta, time was not made of the essence, by either Bangor Punta or Amoskeag.

Two weeks later, on June 16th, Hutchins met with Dumaine and apprised him of the management's decision

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[5] Hutchins explicitly informed Dumaine that time was needed for accountants and tax personnel of Bangor Punta to *review the tax effects of any deal and the evidence unquestionably confirms Hutchins' limited exploratory role.*

[6] The study would require considerable time since it involved going to the Interstate Commerce Commission, sending representatives to Maine and going back over some 70 years of financial history and records and books of the BAR—a time consuming and complex project.



not to approve or accept the unsigned draft letter. He told him that Bangor Punta lawyers and accountants had no time available then to make the investigations and reports deemed essential by the Board; that they were busy with a variety of other matters, including a pending SEC registration statement (the Piper exchange offer); and that it might be two months before they could get to the investigation of the factors material to Bangor Punta's consideration of a sale.

Bangor Punta's general exchange offer for the common stock of Piper Aircraft expired at 5 P.M. on July 29, 1969 and was approved by Bangor Punta's shareholders on August 7, 1969. On August 8, 1969, Bangor Punta commenced distributing its securities to Piper shareholders who had accepted the exchange offer. The final prospectus for the offer stated:

> Until August 27, 1969, all dealers effecting transactions in the registered securities, whether or not participating in this distribution, may be required to deliver a Prospectus.

In the latter part of August, 1969, with the exchange program well nigh completed, Hutchins approached the general counsel of Bangor Punta with the suggestion that the required studies in respect to a sale of BAR go forward. Following instructions from the president, counsel began to gather the information which the Board of Directors was seeking.[7]

On September 9, 1969, Bangor Punta's Board of Directors continued their discussions regarding the sale of BAR, which according to the minutes "has been under

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[7] The president was, however, careful to caution counsel not to allow the inquiry to interfere with any pressing current matters.

the consideration by the Board of Directors for a considerable period of time". Various proposals concerning the sale of the railroad were discussed, including an asset sale, a combination of a partial sale of the assets and a leasing arrangement of the remaining assets, and the sale of the stock of the railroad.

The Directors voted at that meeting to authorize Hutchins to consummate the sale of either the assets or stock of BAR to Amoskeag or to any other buyer for a consideration of $5 million or more in cash and such other additional consideration and benefits as were in his judgment obtainable and the Board authorized the execution of documents and the taking of all other action necessary to consummate a sale in accordance with the terms and conditions so to be negotiated.

Six days later, on September 15, Hutchins wrote to Dumaine that Bangor Punta had not yet reached a decision as to whether it would be most advantageous to dispose of its interest in the BAR through a sale of the stock ownership or in the form of an assets sale. Hutchins proposed to Dumaine that an agreement be worked out which would allow Bangor Punta, at its option, to sell either the BAR stock or assets.

On October 2, Hutchins and Robertson met with Dumaine in Boston. Dumaine refused to change his position in respect of an assets transaction. Thereupon, a contract for the sale of the stock of BAR to Amoskeag was prepared and signed and the closing followed immediately thereafter.

The agreement of sale called for payment of $5 million in cash and other consideration. It was agreed that, if within three years BAR should transfer all of its assets except in a transaction in which neither gain nor loss is recognized for federal income taxes, Amoskeag would pay



Bangor Punta an additional $1.5 million within 30 days after such transfer sale or other disposition.[8] And, subject to specified conditions, Amoskeag agreed that it would also pay the net profits received by BAR within the next five years from sale of all or any part of its property at Sears Island, Maine.

The public announcement of the BAR sale on October 3, 1969 expressly stated that it would result in a non-recurring book loss of approximately $13 million with no tax benefit to the company and that part of the $5 million to be received in cash for the stock would be subject to capital gains taxes.

**Major Factual Contentions and Conclusions**

It is contended by the Commission—and Dumaine gave testimony supporting the notion—that, at some undefined time during June, July or August, Bangor Punta had decided upon the sale to Amoskeag but decided to defer it to avoid disclosure in the pending registration statement and prospectus. These contentions, as well as Dumaine's testimony on the subject, lack support both in the credible evidence and in the probabilities. Indeed the evidence which the Court accepts as worthy of belief unequivocally negates any such purpose or plan.

The Commission's reliance on Dumaine's testimony is misplaced and the inferences which it has sought to draw that a sale was determined upon and deliberately deferred to avoid disclosure, are not accepted.[9]

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[8] The purpose of this provision is not entirely clear. It may have been intended to act as a deterrent to Amoskeag to consider any course but continuance of operation of the road.

[9] From observation during the trial the Court concludes that both Dumaine and Hutchins who negotiated and desired the sale, believed what they wished to believe, that their personal agreement concluded all but the formalities.

The Bangor Punta Board's behavior was consistent with the dictates of prudence. It insisted on consideration and study of alternatives. It accepted the sale only after being convinced that no viable alternatives existed. If there was a conscious tactical motive in delay, the most believable one is that the Board hoped to let Dumaine (and indeed Hutchins, whose personal commitment to the sale was obvious) simmer long enough to come up with something better. Indeed, even after the Board meeting of September 9, information was being supplied to the Board and, on September 29, some of the Board members attempted to block a sale of stock and bring about a sale of assets. Their reasons were weighty—for a sale of assets might permit the reflection of a tax loss as high as $17.7 million, with some $9 million of cash flow addition for Bangor Punta—as distinguished for the taxability of proceeds from sale of stock.

Thus, while the Court finds that there was an intention to sell, failing other alternatives and upon the best available tax and accounting bases, the Court does not find that Bangor Punta consciously concealed, deferred or refrained from going forward with Dumaine's offer in order to circumvent disclosure in a pending registration statement.

**Requirements of Disclosure**

Bangor Punta could not in its registration statement and prospectus for the exchange offer omit "to state [any] material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Section 10(b) of the Securities Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 CFR 240.10b-5.

Bangor Punta's registration statement became effective on July 18, 1969. It "spoke" as of that date. The duty of



dealers to use prospectuses continued until August 27, 1969.[10] The Commission insists that as of these dates Bangor Punta intended to sell and there was a reasonable probability that it would sell BAR at a substantial loss. Its failure to reflect this state of affairs is claimed to constitute the violations charged.

The Court has found that as of these dates Bangor Punta had not reached a decision to sell. The Commission's charge that the sale was a reasonable probability is made from the vantage point of hindsight. In the total perspective of events preceding the sale—including the last-minute attempts to convert it into a sale of assets—the Court cannot find that the sale was a reasonable probability at the time and to the people involved. *Cf. James Blackstone Mem. Library Assn.* v. *Gulf, Mobile and Ohio R. Co.*, 264 F.2d 445 (7th Cir.), *cert. denied*, 361 U.S. 815 (1959). However, this does not necessarily mean that Bangor Punta met the obligation imposed upon it to make a requisite disclosure under the circumstances of this case. For the circumstances do indicate a sufficiently serious consideration of the possibility of sale at a figure some $13 million below the then carrying value of the BAR stock on Bangor Punta's books so as to force the conclusion that the Bangor Punta directors could not, at the time, have believed that the $18.4 million figure (based on an appraisal of 1965 fair market value) any longer represented a responsible appraisal of market value of the BAR holding.

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[10] The antifraud provisions of the Securities Act (§ 17(a)) and of the Exchange Act (§ 10(b) and Rule 10b-5) require the prospectus to reflect any post-effective changes necessary to keep the prospectus from being misleading in any material respect. This is sometimes handled mechanically by putting a sticker on the prospectus or supplementing it otherwise. The procedure to be used is set forth in 17 CFR 230.424(c).

In this respect, however, the Commission is claiming more than it needs to. The essential question is whether, despite the non-existence of intent or of reasonable probability, the circumstances surrounding the sale were such as to indicate that the $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading. The Court finds that it was—absent full disclosure of the factors affecting the ultimate decision to sell the BAR interest at a figure of $5 million—or even $7 million—and regardless of whether the sale was to be of stock or of assets.

The Court is aware of no principle of accounting or of fair disclosure which would justify a failure to up-date a constructed carrying figure which may have reflected approximate fair value in 1965 but which was almost four times the offer of a willing buyer (and the only willing buyer) in 1969—an offer which the Board, despite its efforts in good faith to find alternatives—was constrained ultimately to accept. Consistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier.

I find that Bangor Punta did not intentionally or purposefully mislead Piper Aircraft stockholders or the public or investors by the omission to make disclosure of the sale under consideration nor did Bangor Punta or its directors intend to gain an advantage over Chris-Craft by the nondisclosure in the contest being waged for control of Piper. There was no purposeful connection between the nondisclosure and the contest for control. In other words, the nondisclosure was not prompted by an improper purpose. However, absence of bad faith does not excuse the failure to state facts necessary to make the facts stated not misleading.

The explanatory footnote which did appear on the 1969 balance sheet was given so that anybody looking at the



financial statements would not be confused as to why the full equity of the railroad was not picked up by Bangor Punta as the carrying value of its investment. By the same token, the 1965 constructed carrying value should not have been used when it was known to substantially exceed the only bid that could be generated from a purchaser capable and willing to buy and operate the asset.

**Bearing on Exchanging Piper Holder**

The standard of materiality to be applied here is whether a reasonable stockholder of Piper might have hesitated to make an exchange for Bangor Punta securities with such a large loss figure emerging—at least until sufficiently explained and put in proper perspective, in terms understandable by a reasonable investor.

At the end of fiscal 1968, Bangor Punta had retained earnings of $37.9 million. A sale of the stock at $5 million would result in a book loss equivalent to 36.5% of such retained earnings.

At the end of fiscal 1968, the shareholders' book equity in Bangor Punta was $113.5 million and a sale of the BAR at $5 million would result in a loss of 12% of the shareholders' book equity.

Bangor Punta had reported profits for each of the five years ending with that for September 30, 1968. A sale such as was being investigated would involve the loss ($4.32 per share) which would have far exceeded the company's net income for any of the five prior years.

The Court concludes that the registration statement and prospectus of Bangor Punta relating to the Piper exchange offer was misleading in its failure to disclose the circumstances surrounding the negotiations for sale of the BAR interest. In so holding especial note is taken of the

unique "valuation" nature of the $18.4 million figure at which the BAR interest was carried on Bangor Punta's books. The present conclusion is not necessarily to be taken as applicable in cases where book carrying figures are in accordance with principles of conventional transactional accounting or where circumstances might otherwise be different.

**Relief to be Granted**

The Commission has requested an order requiring Bangor Punta to offer rescission to shareholders who accepted the Bangor Punta exchange offer and an order enjoining Bangor Punta from further violations of the securities laws. The Court grants the first and denies the second of these requests.

Bangor Punta claims that such an offer of rescission would be an empty exercise since the Bangor Punta securities received by the Piper shareholders have a market value far in excess of the Piper shares given up by them. See *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969). The decision whether to rescind is nonetheless one to be made by those who took the exchange.

Accordingly, Bangor Punta will be required to make an offer of rescission and the parties are directed to submit an appropriate decree for the Court's consideration to carry out such an offer. Such offer should allow Bangor Punta full scope to point out any factual considerations bearing on a decision to accept or by-pass rescission as may be accurate and appropriate under the circumstances.

Bangor Punta claims that an injunction is unnecessary and inappropriate since there is no evidence of its bad faith; that it acted on advice of counsel and of its accountants; and that this was an isolated transaction involving a single unintentional violation. *Securities and Exchange Commission* v. *Torr*, 87 F.2d 446 (2d Cir. 1937). Moreover, Bangor Punta contends that its past conduct does not indicate a reasonable likelihood of future violations. *Securities and Exchange Commission* v. *Franklin Atlas Corp.*, 171 F. Supp. 711 (S.D.N.Y. 1959) (Dawson, J.); *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*,_____ F.2d _____ (2d Cir. June 10, 1971).



The Commission insists that Bangor Punta has demonstrated a propensity for violating the securities law because the company allegedly violated a consent decree entered on May 26, 1969 by the United States District Court for the District of Columbia in the Commission's suit there against Bangor Punta, by filing a registration statement which omitted to disclose the facts discussed in this opinion. That suit centered on a Bangor-Punta-Piper release of May 8, 1969. Bangor Punta consented to the decree and the Commission's complaint here avers that the company's demonstrated propensity for violating the securities laws is not at all based upon the issuance of that release (which is a subject of controversy in an action by Chris-Craft against Bangor Punta and others). *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 426 F.2d 569, 573-576 (2d Cir. 1970) and *ibid* 69 Civ. 2354 now before this Court for decision.

Under all the facts and circumstances in this case, the Commission has failed to carry its burden to establish, with persuasive evidence, that Bangor Punta, its officers, directors and employees have a propensity or natural inclination to violate the securities law. *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, _____ F.2d ____ (2d Cir. June 10, 1971). Accordingly, the requested injunction is denied.

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*District Court Opinion*
*in S.E.C. v. Bangor Punta Corporation*

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

Submit decree in accordance with these findings on 15 days notice.

So Ordered.

Milton Pollack
*U.S. District Judge*

August 25, 1971

D-19

*District Court Memorandum on Settlement of Judgment*
*in S.E.C. v. Bangor Punta Corporation*

# United States District Court

Southern District of New York

| | |
|---|---|
| Securities and Exchange Commission, *Plaintiff*, *v.* Bangor Punta Corporation, *Defendant.* | 70 Civ. 3940(MP) |

## MEMORANDUM

Pollack, *District Judge.*

Bangor Punta requested the Court to reopen the record and to make additional findings of fact. Subsequent to receiving SEC's opposition to the request, Bangor Punta withdrew the application to reopen the record as unnecessary and has substituted a request that the Court issue a statement in disposing of this matter that generally accepted accounting principles were not litigated herein. The request and opposing paper are being filed herewith.

It is beyond the scope and intent of the opinion of August 25, 1971 to consider or decide what constitute accepted principles of accounting in the abstract. The opinion deals solely with the requirements of a prospectus used on an exchange of securities and what is to be considered misleading in connection therewith. Any differences between accepted principles of accounting and fair disclosure in a prospectus must be resolved in favor of the disclosure requirements of a prospectus which essentially are a management not an accountant's responsibility.

The application to reopen the record and for additional findings is accordingly denied.

So Ordered.

(original signed)
Milton Pollack

*U. S. District Judge*

September 17, 1971

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
*Plaintiff,*
*v.*
BANGOR PUNTA CORPORATION,
*Defendant.*

70 CIV. 3940 (MP)

## MEMORANDUM ON SETTLEMENT OF JUDGMENT

POLLACK, *District Judge.*

A provision has been inserted in the decree submitted for settlement requiring that any rescinding holder should account on the offer of rescission for any profits realized from interim sale of all or any part of the original stock obtained on the exchange in August, 1969.

The purpose of restitution is to put the injured party in as good (not a superior) position as that occupied by him before the contract or sale or exchange was made. If a rescinding party has made profitable use of the subject of the rescission, or has received fruits such as dividends or interest or other benefits thereon, these profits, fruits, other benefits and their values must be accounted for by the rescinding party to effect a return to the *status quo ante*. A party will not be permitted to retain the benefits or fruits of a contract and at the same time repudiate it. It is inappropriate for a rescinding party to in effect affirm his ownership in part and to disaffirm the entire transaction.

> It is a prerequisite to restitution that a party disgorge to the other party any proceeds the former has received



> upon disposition of the original property. *Marr* v. *Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931).
>
> *Mott* v. *Tri-Continental Financial Corp.*, 330 F.2d 468, 470 (2d Cir. 1964).

Ordinarily, if one no longer owns the original shares acquired in a rescindable transaction, he is limited to an action for damages and may not be accorded rescission. *Mott* v. *Tri-Continental Financial Corp., cit. supra,* at 470. Equity may waive this requirement in a proper case and may permit the rescinding party to account to the other party for the value of any part sold. Williston, *Contracts*, § 1463, p. 161 (3rd ed., Vol. 12, 1970). Equity may also permit the restitution to consist of substitute shares acquired for the purpose of rescission. In that event, everything of value including the profit, if any, realized from a prior sale or disposition of the original stock and the subsequent reacquisition of like shares must be accounted for to the other party as a prerequisite to rescission, in the same way as other fruits of the interim ownership must be restored. See, Corbin on *Contracts* §§ 1114-1115, Volume 5 (1964 Ed.); 17 Am. Juris. 2d § 512, p. 996 (2d Ed. 1964); *Marr* v. *Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931); *Ufland & Co.* v. *McMahon*, 215 App. Div. 267, 269 (4th Dept. 1926); *Commissioner of Banks* v. *Chase Securities Corp.*, 298 Mass. 285, N.E. 2d 472, 499, 500 (1937); *E.T.C. Corp.* v. *Title Guar. & Trust Co.*, 271 N.Y. 124, 2 N.E. 2d 284 (1936).

November 17, 1971

MILTON POLLACK
*U. S. District Judge.*

D-22

*District Court Opinion in Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.*

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
*Plaintiff,*
*v.*
CHRIS-CRAFT INDUSTRIES, INC., *et al,*
*Defendant.*
} 69 CIV. 2354 (MP)

## OPINION

APPEARANCES:

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POLLACK, *District Judge.*

D-23

*District Court Opinion in Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.*

POLLACK, *District Judge.*

This cross action by Bangor Punta, a defendant in *Chris-Craft* v. *Bangor Punta et al* (S.D.N.Y. 69 Civ. 2227) decided this day, arises out of the bitter struggle between the two companies for control of Piper Aircraft Corporation. That struggle ended in the marketplace with Bangor Punta in control and continues in the complaints and cross complaints by the parties against each other arising out of their competition.[1]

The principal facts are set out in this Court's opinion in S.D.N.Y. 69 Civ. 2227. They will be deemed incorporated and need not be repeated at length here.

Chris-Craft sued for damages as the losing contender for control of Piper by reason of Bangor Punta's alleged wrongful acts. Bangor Punta countered by charging, in essence, that because of the wrongful acts of Chris-Craft it paid more than it would otherwise have paid to acquire control of Piper. Both suits were tried together.

Bangor Punta adduced no proof specifically in its case as plaintiff. It seeks support for its contentions in the record developed in *Chris-Craft* v. *Bangor Punta, et al.* (S.D.N.Y. 69 Civ. 2227).

This complaint, like that in the companion case, is replete with charges of breach of the requirements of securities laws and rules. Like the other, it has been brought and tried as though any such breach by a competitor automatically creates windfalls for a sophisticated and well-financed contender for corporate control. It must be remembered that this is an action by the willing and winning contender which bought Piper stock with its eyes open, presumably paying what it deemed control of Piper to be

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[1] Piper, the target company, asserted a counter claim against Chris-Craft in S.D.N.Y. 69 Civ. 2227.

worth. The Court has here been especially challenged to maintain its footing in the realities and the equities in searching (in vain) for credible evidence establishing causal connections between alleged violations and actionable damage.

**The Contentions**

(a) Bangor Punta insists that the plan of Chris-Craft to acquire control of Piper existed before the time when, according to Chris-Craft, the plan was formulated and that Chris-Craft concealed its true purpose from a registration statement filed with SEC to raise capital for the purchase and from prospectuses legally required to be used during a period when its unrevealed plan to obtain control of Piper was in existence.

We comment here on this contention because it is typical of others in the case. Even if it rested on more than mere surmise, it raises no issue proper to a plaintiff in Bangor Punta's posture. Bangor Punta was not a purchaser of securities issued under the statement of which it complains. There are possible links of relevance between the alleged deficiency in the registration statement and Bangor Punta's campaign. But they are not links to liability of Chris-Craft to Bangor Punta. Thus:

(1) If the registration statement were materially misleading there might be room to argue that Chris-Craft obtained by illegal means the money used to compete with Bangor Punta. There might then be examined the rights of those from whom the money was so obtained. But the Court sees no basis for awarding damages to Bangor Punta because Chris-Craft failed to disclose to its sources of funds its intended use of those funds.

(2) If Chris-Craft did intend to use the proceeds of this registered issue to obtain control of Piper, a disclosure of



that fact would have given Piper (and/or Bangor Punta) an earlier opportunity than they had in fact to prepare a counter-campaign. However, Chris-Craft owed no duty to Piper or Bangor Punta to announce its intentions for their benefit. Its disclosure obligations (assuming they existed as alleged) in the prospectus complained of or in 13-D reports, were for the benefit of investors with whom Chris-Craft would be dealing in its campaign for control.[1A] Bangor Punta does complain of failure to make—and of inadequate —13-D statements. Thus:

(i) It asks us to find that Chris-Craft and the broker it used to buy Piper stock constituted a "group" or "syndicate" whose intentions should have been reported.

(ii) It contends that 13-D statements made by Chris-Craft should have disclosed that (as alleged by Bangor Punta) cash used in Chris-Craft's tender offer was borrowed and that such use of the cash would constitute a default under certain of Chris-Craft's arrangements with its creditors.

The first of these contentions is not only far-fetched, but is wholly out of Bangor Punta's reach as a weapon against Chris-Craft. The latter contention would be a dubious one even if made by a Piper stockholder to whom the statement is specifically addressed. For that stockholder either tenders and walks off with cash or remains a Piper holder having no concern with Chris-Craft's relations with its creditors.[2]

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[1A] See, *GAF Corporation* v. *Milstein*, 324 F.Supp. 1062 at 1070 (S.D.N.Y. 1971) (Pollack, J.) "the Williams Bill concentrated on an investor protection goal rather than on providing protection for management's ability to repel raiders."

[2] The situation is not the same, of course, in a registration statement covering an offer of exchange. There the accepting holder of target company stock is destined to become an investor in the offering company—with a strong interest in that company's relations with its creditors.

(b) Bangor Punta alleges that Chris-Craft opened a "secret" "numbered" account at a brokerage firm which assisted it in locating and acquiring large institutionally held blocks of Piper. At least one institution (Technology Fund) it is claimed, to which Chris-Craft paid $65 per share for more than 100,000 shares of Piper—at a time when the market was in the low fifties—simultaneously made a large purchase of Chris-Craft stock in the open market. The alleged purpose of this allegedly prearranged move was to "stabilize or manipulate" the price of Chris-Craft common. Chris-Craft planned to include in its acquisition program an offer of exchange of Chris-Craft for Piper securities. Obviously, a high price for Chris-Craft common would greatly facilitate such an exchange.

(c) Several other institutions (one of which had tendered Piper stock to Chris-Craft for cash during the pendency of a Chris-Craft tender offer) also bought large amounts of Chris-Craft on the open market. In the month shortly before Chris-Craft filed its registration statement to cover its proposed exchange offer, these institutions purchased some 231,800 Chris-Craft shares (more than 17%) of the number outstanding. These purchases caused the daily average of trading on the New York Stock Exchange to increase from 7,500 shares to 23,400 shares. The price of Chris-Craft common, during this month, rose to 45% above the average of its closing prices for the six weeks preceding these purchases.

By mid-1970, with the serious market decline notably in prices of stocks of conglomerates, the institutions were taking heavy losses. Their liquidations of position, Bangor Punta claims, were designed to do the least damage to the price of Chris-Craft and hence to the progress of Chris-Craft's exchange offer program.



(d) While its cash tender offer for Piper stock was open Chris-Craft was also buying Piper stock in the open market. This was a violation of S.E.C.'s Rule 10b-6 and the Commission, upon becoming aware of what was happening, ordered Chris-Craft to cease these purchases. Thereupon at least one institution (which had previously sold a large block of Piper to Chris-Craft) purchased Piper stock in the open market and tendered the shares to Chris-Craft. Bangor Punta claims the transaction to be a device to have done by others what Chris-Craft could not do itself.

Bangor Punta bottoms its case on Rule 10b-5 under the Securities Exchange Act,[3] claiming that Chris-Craft's "integrated" bid for control of Piper was in its entirety a "manipulative and deceptive contrivance" whose total effect was to inflate the price of Piper stock and so to damage Bangor Punta as a purchaser of that stock It cites *Eagle* v. *Horvath*, 241 F. Supp. 341, 344 (S.D.N.Y. 1965) for the proposition that while a thoroughly legal campaign by Chris-Craft for control of Piper might also have raised the price of Piper stock, it must make restitution for having done the same thing by illegal means.[4] It cites other cases

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[3] 17 C.F.R. § 240.10b-5 (1971)

[4] *Horvath* and apposite cases, if at all applicable here, are in an important sense contrary to Bangor Punta's position. Bangor Punta asks us to regard the entire Chris-Craft program as fatally tainted because of alleged violation spots in the program. It does not bear the burden of showing the causal relation between the violations themselves and its damage. Yet, the holding in *Horvath* is precisely that such a relation is a vital issue. In *Horvath* a motion for summary judgment in a stockholders' suit was denied because there was, at issue, the question whether an alleged false prospectus in fact motivated stockholder votes on the plan being attacked in the case.

We did not, at Chris-Craft's instance, spread the taint of single alleged violations by Bangor Punta over all of Bangor Punta's campaign. We see no warrant for a contrary treatment of Bangor Punta's contentions here.

for the propositions that privity between buyer and seller is not an essential condition for application of Rule 10b-5, *Fischman* v. *Raytheon,* 188 F.2d 783, 786 (2d Cir. 1951)[5] and that manipulative activities unrelated to the plaintiff and not designed to induce the plaintiff to buy or sell are, nonetheless, actionable. *Cochran* v. *Channing Corp.,* 211 F. Supp. 239 (S.D.N.Y. 1962);[6] *Sarlie* v. *E. L. Bruce Co.,* 265 F. Supp. 371 (S.D.N.Y. 1967).[7] Characterizing itself as a buyer of Piper "deceived" by the manipulative activity of Chris-Craft, Bangor Punta also invokes *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787 (2d Cir. 1969)[8], *cert. denied,* 400 U.S. 822 (1970).

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[5] In *Fischman,* the court (Frank, C. J.) pointed out the difference in proof required to sustain a Section 11 suit under the Act of 1933 and a Section 10-b suit under the Act of 1934. In the former the plaintiff's burden is to show an acquisition of the direct subject of a registration statement while in the latter, any deceived purchaser relying on a *fraud* may sue.

[6] *Cochran* v. *Channing* was a suit by a holder of Agricultural Insurance Company stock who sold at depressed prices and alleged that Channing Corporation, the defendant, dominated the Company, formed an undisclosed plan to secure control of it by offering an exchange of stock of another company for Agricultural and by purchasing Agricultural stock at depressed prices caused by lowering Agricultural's dividend and other similar practices. Judge Dawson of this District held the complaint good under Rule 10b-5 against a motion to dismiss for lack of privity. The case cannot support the contentions of a plaintiff in Bangor Punta's posture. It cannot claim itself a beneficiary of any fiduciary obligation of Chris-Craft such as was deemed by Judge Dawson to be owed by Channing to the plaintiff.

[7] *Sarlie* v. *Bruce* seems wholly inapposite. It involved a default dismissal of plaintiff's action and concerned itself largely with the measure of damages in a counterclaim by a company (Bruce) whose president (Gilbert) allegedly used misappropriated funds in an attempt to capture control of Celotex Corporation.

[8] *Crane* v. *Westinghouse,* is beside the mark. There, the alleged market manipulation was effected for the express purpose of preventing



Other aspects of Chris-Craft's program are complained of—quite apart from their place in an overall scheme alleged to be unlawful.

1. The allegedly induced purchases of Chris-Craft common by institutions preceding the Chris-Craft exchange offer are alleged to be manipulations in violation of Section 9(a)(2) of the Exchange Act[9] which inflated the price of Piper common, as well as that of Chris-Craft. *Crane, supra,* is cited as authority for Chris-Craft's liability.

2. Bangor Punta has reached into the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.,* in its search for deficiencies in Chris-Craft's program and purports to have found one in Section 17(a), 15 U.S.C. § 80a-17(a) (1971) of that Act. The Section (together with relevant Section 2(a)(3), 15 U.S.C. § 80a-2(a)(3)) provides that without an express order of S.E.C.

> SEC. 17(a) It shall be unlawful for any affiliated person or promotor of or principal underwriter for a registered investment company (other than a company of the character described in Section 12(d) (3)(A) and

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a competitor for control from succeeding in its bid and the facts pleaded showed a distinct causal nexus between the manipulation and its actual and intended result. To suggest that Chris-Craft, itself an avid buyer of Piper, "manipulated" the price of Piper upward and to characterize Bangor Punta as a buyer "deceived" by this manipulation strains even credulity.

[9] Section 9(a)(2), 15 U.S.C. § 78i(a)(2)(1971), reads:

> "It shall be unlawful for any person, . . . to effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

(B)), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal ...

(2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property (except securities of which the seller is the issuer) ...

SEC. 2(a)(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; ...

Since, at the time Chris-Craft made its purchase from Technology Fund, *supra,* both it and the Fund owned more than 5% of Piper, Chris-Craft was an affiliate of an affiliate of an investment company and prohibited from making the purchase without prior order of SEC. No such order was ever requested.

**The Merits of the Contentions**

Chris-Craft's response to Bangor Punta's charges is to label Bangor Punta's case as "sheer fantasy" and its inferences as "Kafkaesque logic". Chris-Craft's attacks on the evidentiary underpinning and legal support of Bangor Punta's case would require a minute consideration of the record and of precedents cited were this Court to accord to Bangor Punta the status of damaged innocent which it claims for itself.

But Bangor Punta cannot wear that mantle. It was the willing and winning contestant in a hard fought and (for both sides) enormously expensive struggle for control.



This Court will readily agree that Bangor Punta paid more to acquire control of Piper than it would have if Chris-Craft had not, by the time Bangor Punta entered the contest, already been well on its way in acquiring Piper stock. Indeed the possibilities are that, if Chris-Craft had not already shown itself to be so powerful a bidder for control, Bangor Punta's cost would have been zero. For the record is ineluctably convincing that Bangor Punta came in at Piper's urging and specifically to resist Chris-Craft.

In dealing with *Chris-Craft* v. *Bangor Punta et al., supra,* this Court made it clear that it would not, at the behest of a disappointed contender in a battle for corporate control, necessarily take the same view of the requirements of the securities laws and rules as it does in cases of claimed injury to the average public investor. These considerations apply with even greater vigor to actions by the winner complaining that he was forced to overpay.

Bangor Punta's claim of "integrated" and "concerted" efforts by "coparticipants" has no more weight than similar language aimed by Chris-Craft, as plaintiff, against Bangor Punta as defendant. Chris-Craft has amply disposed of several of Bangor Punta's factual contentions (as e.g., its charge that an originally submitted and then deleted portion of Chris-Craft's registration statement to cover its debenture issue in December 1968 "evidenced" an undisclosed intention to acquire Piper with the proceeds). But even taking on their face each of Bangor Punta's charges of violations leaves us asking why Bangor Punta should be made a money beneficiary. The price it paid for Piper it paid with open eyes. The rapport between it and the Piper management should have given it more easy access to information about Piper than was available to Chris-Craft—even with two Chris-Craft representatives on the

Piper board. Its inducement to pay the prices it did for Piper control was not in any one or combination of the violations it seeks to lay at Chris-Craft's door step. The inducement was its own determination to have control.[10]

However, even if Bangor Punta were an apt plaintiff to raise the shield of the securities laws and rules for its protection, this Court would have great difficulty in finding—on facts and law—that a convincing case has been made out. Bangor Punta did not carry its burden of persuasion on the issues presented in its case against Chris-Craft. Its basic claim that Chris-Craft "manipulated" upward the price of Piper stock asks us to assume that Chris-Craft massaged the market against its own interest—since Chris-Craft was in an acquisition campaign—and that Bangor Punta, amply aware of what Chris-Craft was doing and bidding Chris-Craft up, was somehow victimized by this massaging.[11] The claim is patently untenable. Its claim that purchases of Chris-Craft common by institutions were arranged for manipulative or evasive reasons are

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[10] The disposition of this case and of *Chris-Craft* v. *Bangor Punta et al.*, S.D.N.Y. 69 Civ. 2227 eliminates any requirement for findings as to damages. Were such findings necessary, this Court could give no weight to the unsubstantiated and cursory evidence presented on behalf of Chris-Craft. On the other hand, the careful and well-documented analysis presented by the expert for Bangor Punta was persuasive in the main on the issue of fair market value of Piper stock in or about May, 1969 during, but uninfluenced by, the contest for control and fair market value uninfluenced by extraneous factors at the time of the trial herein in March, 1971.

[11] The willingness of an innocent buyer to pay a manipulated price does not deprive him of a right to complain of the manipulation. But the essence of a manipulation is the execution of transactions affecting prices or actual or apparent market activity for the purpose of inducing others to buy or sell. While Chris-Craft's initial and subsequent bids raised the prices of Piper stock these bids were for the *bona fide* purpose of acquiring stock for itself, not to induce others to buy the stock.



pure surmise—such basis as they do have is purely circumstantial and lacks the persuasive power needed to support such charges. The charge that in disposing of Chris-Craft holdings the institutions acted to produce the least possible disturbance of price does no more than charge the institutions with ordinary prudence in their management of their affairs.

The charge of violation of Section 17(a) of the Investment Company Act, 15 U.S.C. § 80a-17(a)(1971) has some surface plausibility but as little substance as the others. That section can apply to the Chris-Craft-Technology Fund transaction only upon a most abstrusely technical reading. It is not clear whether the mechanics of transfer and delivery and the "as of" dates for voting of Piper stock at a forthcoming meeting were such as to truly vest in Chris-Craft voting power for its 5% plus holding in Piper at the time. Even if it did have that power, the record before this Court is convincing that Chris-Craft, did not then or thereafter, exercise any controlling influence in Piper. Section 17(a) was designed to protect an investment company in its transactions with affiliates. In view of the price received by the Technology Fund ($65 per share as against the then market in the low fifties) and of subsequent events, it is difficult to discern any harm to the Fund in its sale of Piper stock to Chris-Craft. Bangor Punta is, under the circumstances, well beyond the pale of protection fairly intended by Section 17(a) of the Investment Company Act.

Bangor Punta's charges, compiled by able and diligent counsel, are an illuminating catalogue of pitfalls in the path of a contender for control of an unwilling target, competing with a well-financed adversary. However, the diligence is misplaced. The alleged breaches must not only be supported by credible evidence but must, importantly, be

causally linked to damages. The complaint falls short on both scores.

The complaint is dismissed for failure to sustain with credible evidence, the burden of proof cast upon the plaintiff.

The foregoing shall constitute the findings and conclusions required by F. R. Civ. P. 52(a).

So Ordered.

(original signed)

Milton Pollack
*U. S. District Judge*

December 10, 1971

## E.


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**Final Judgment of Court of Appeals**

# United States Court of Appeals

FOR THE

SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of April one thousand nine hundred and seventy-five.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
*Circuit Judges,*

CHRIS-CRAFT INDUSTRIES INC.,
*Plaintiff-Appellant,*

v.

PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, WALTER B. MCKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER, N. HAYARD,
*Defendants-Appellees*

AND

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO, DAVID W. WALLACE,
*Defendants-Appellees-Appellants.*

74-2542
75-7003

*Final Judgment of Court of Appeals*

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.**

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed and vacated in part and that the action be and it hereby is remanded to said District Court with instructions in accordance with the opinion of this court with costs to be taxed against defendants-appellees-appellants.

A. Daniel Fusaro,
*Clerk*

By Vincent A. Carlin,
*Chief Deputy Clerk*



**Order of Court of Appeals Denying Petition for Rehearing on Final Judgment**

# United States Court of Appeals

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Ninth day of June, one thousand nine hundred and Seventy Five.

Present:

Hon. Walter R. Mansfield
Hon. James L. Oakes
Hon. William H. Timbers,
*Circuit Judges.*

| | |
|---|---|
| Chris Craft Industries, Inc.<br>*Plaintiff-Appellant*<br>*v.*<br>Piper Aircraft Corp. Charles W. Pool The First Boston Corporation Etc.,<br>*Defendants-Appellees*<br>Piper Aircraft Corp. Howard Piper, Thomas F. Piper William T. Piper Jr. Bangor Corp. Nicholas M. Salfo,<br>*Defendants-Appellees-Cross-Appellants* | Docket No. 74-2542 |

A petition for a rehearing having been filed herein by counsel for the defendant-appellee-cross-appellant, Bangor Punta Corp.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro,
*Clerk*

**Order of Court of Appeals Denying Petition for Rehearing on Final Judgment**

# United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and SEVENTY FIVE.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS,
*Circuit Judges.*

| | |
|---|---|
| CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP. CHARLES W. POOL THE FIRST BOSTON CORPORATION ETC., *Defendants-Appellees* PIPER AIRCRAFT CORP. HOWARD PIPER THOMAS F. PIPER WILLIAM T. PIPER JR. BANGOR CORP. NICHOLAS SALGO, *Defendants-Appellees-Cross-Appellants* | Docket No. 74-2542 |

A petition for a rehearing having been filed herein by counsel for the defendant-appellee-First Boston Corporation.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
*Clerk*



**Order of Court of Appeals Denying Petition for Rehearing on Final Judgment**

# United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and SEVENTY FIVE

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS,
*Circuit Judges.*

| | |
|---|---|
| CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP. CHARLES W. POOL THE FIRST BOSTON CORPORATION ETC., *Defendants-Appellees* PIPER AIRCRAFT CORP. HOWARD PIPER THOMAS F. PIPER WILLIAM T. PIPER JR., BANGOR CORP. NICHOLAS M. SALGO, *Defendants-Appellees-Cross-Appellants* | Docket No. 74-2542 |

A petition for a rehearing having been filed herein by counsel for the defendants-appellee-cross-appellant, Howard Piper, etc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
*Clerk*

**Order of Court of Appeals Denying Petition for Rehearing in banc on Final Judgment**

# United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Ninth day of June, one thousand nine hundred and seventy-five.

CHRIS CRAFT INDUSTRIES, INC.,
*Plaintiff-Appellant*

*v.*

PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc.
*Defendants-Appellees*

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO,
*Defendants-Appellees-Cross-Appellants*

Docket 74-2542

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee-cross-appellant, Bangor Punta Corp a poll of the judges in regular active service having been taken and there being no majority in favor thereof

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
*Chief Judge*



**Order of Court of Appeals Denying Petition for Rehearing In Banc on Final Judgment**

# United States Court of Appeals

SECOND CIRCUIT

**At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the NINTH day of JUNE, one thousand nine hundred and seventy-five.**

CHRIS CRAFT INDUSTRIES INC.,
*Plaintiff-Appellant*

*v.*

PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc.,
*Defendants-Appellees*

PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO,
*Defendants-Appellees-Cross-Appellants*

Docket No. 74-2542

**A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellee-cross-appellant, Howard Piper, etc. a poll of the judges in regular active service having been taken and there being no majority in favor thereof,**

**Upon consideration thereof, it is**

**Ordered that said petition be and it hereby is denied.**

IRVING R. KAUFMAN,
*Chief Judge*

**Order of Court of Appeals Denying Petition for Rehearing In Banc on Final Judgment**

# United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of June, one thousand nine hundred and seventy-five.

| | |
|---|---|
| CHRIS CRAFT INDUSTRIES INC., *Plaintiff-Appellant* v. PIPER AIRCRAFT CORP., CHARLES W. POOL, THE FIRST BOSTON CORPORATION, etc., *Defendants-Appellees* | Docket 74-2542 |
| PIPER AIRCRAFT CORP., HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORP., NICHOLAS M. SALGO, *Defendants-Appellees-Cross-Appellants* | |

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, First Boston Corporation, a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
*Chief Judge*



**Interlocutory Judgment of Court of Appeals**

# United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present:

HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
*Circuit Judges*
HON. MURRAY I. GURFEIN
*District Judge*

| | |
|---|---|
| CHRIS-CRAFT INDUSTRIES, INC., *Plaintiff-Appellant,* v. PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA, CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, JR., WALTER B. MCKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and N. BAYARD, *Defendants-Appellees.* | 72-1064 |

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.**

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

*Interlocutory Judgment of Court of Appeals*

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
*Clerk*



*Order Denying Petition for Rehearing on Interlocutory Judgment*

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

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**Docket No. 72-1064**

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CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

*v.*

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

*Defendants-Appellees.*

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**ORDER**

Petitions for rehearing having been filed herein on March 30, 1973 on behalf of appellees Howard Piper, Thomas F. Piper and William T. Piper, Jr.; on behalf of appellees Bangor Punta Corporation, Nicolas M. Salgo and David W. Wallace; and on behalf of appellees The First Boston Corporation, Paul L. Miller and Nicholas H. Bayard; and

Due consideration by the undersigned members of the panel having been given to said petitions for rehearing; it is therefore

*Order Denying Petition for Rehearing on Interlocutory Judgment*

ORDERED as follows:

(1) That, with respect to the petition for rehearing on behalf of appellees Paul L. Miller and Nicholas H. Bayard, the said petition is granted to the extent that the main opinion filed herein on March 16, 1973 is amended by adding the following sentence at the end of the first paragraph concluding on slip opinion page 4965, line 12:

> "In view of the voluminous record, upon remand, the district court shall determine from the record whether, under the principles of liability regarding First Boston and its officers in this opinion, Paul L. Miller and Nicholas H. Bayard, or either of them, is individually liable."

(2) That in all other respects the said petitions for rehearing are denied.

Dated at New York, N.Y. this 25th day of April, 1973.

WALTER R. MANSFIELD

WALTER S. MANSFIELD
*United States Circuit Judge*

WM. H. TIMBERS

WILLIAM H. TIMBERS
*United States Circuit Judge*

MURRAY I. GURFEIN

MURRAY I. GURFEIN
*United States District Judge*



*Order Denying Petition for Rehearing on Interlocutory Judgment*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

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CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

*v.*

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

*Defendants-Appellees.*

---

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, The First Boston Corporation, et al., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

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A. DANIEL FUSARO, *Clerk*

*Order Denying Petition for Rehearing on Interlocutory Judgment*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

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CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

*v.*

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

*Defendants-Appellees.*

---

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Bangor Punta, et al., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

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A. DANIEL FUSARO, *Clerk*



*Order Denying Petition for Rehearing on Interlocutory Judgment*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-three.

---

CHRIS-CRAFT INDUSTRIES, INC.,

*Plaintiff-Appellant,*

*v.*

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and NICHOLAS H. BAYARD,

*Defendants-Appellees.*

---

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Piper, et al., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

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A. DANIEL FUSARO, *Clerk*

## F.


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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*

*—against—*

PIPER AIRCRAFT CORPORATION, CHARLES W. POOL, WALTER C. JAMOUNEAU, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICHOLAS M. SALGO, DAVID W. WALLACE, HARRY S. BAKER, ROBERT L. CHAMBERS, JAMES S. GARVEY, WILLIAM E. HILL, CURTIS M. HUTCHINS, GEORGE S. JONES, FREDERICK H. KINGSBURY, JR., WALTER B. McKINNEY, W. GORDON ROBERTSON, GEORGE H. SEAL, ROBERT G. STONE, W. JEROME STROUT, JAMES G. TREMAINE, HARRY C. WOOD, THE FIRST BOSTON CORPORATION, PAUL L. MILLER and N. BAYARD,
*Defendants.*

69 Civ. 2227 :MP

## SECOND AMENDED COMPLAINT

Plaintiff, complaining of defendants, alleges on information and belief, except as to paragraphs 1, 3, 5, 9, 12, 17 through 19, 28, 29, 31, 33, 58, 59, and 63 through 66:

1. The jurisdiction of this Court is based upon 28 U.S.C. § 1331(a), Section 27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78aa), and Section 22 of the Securities Act of 1933, as amended (15 U.S.C. § 77v). This action is brought under Sections 9, 10, 14 and 16 of the Securities Act of 1934, as amended, Section 5 of the Se-

curities Act of 1933, as amended, and under the rules promulgated with respect to each such Act (collectively referred to herein as the "securities laws").

2. The acts, or some of them, constituting the violations of law complained of took place within the Southern District of New York.

3. Plaintiff Chris-Craft Industries, Inc. ("Chris-Craft") is a Delaware corporation having its principal executive offices in the City, County and State of New York. Shares of Chris-Craft's common and preferred stock and convertible debentures are traded on the New York Stock Exchange ("NYSE").

4. (a) Defendant Piper Aircraft Corporation ("Piper") is a Pennsylvania corporation having its principal place of business in Lock Haven, Clinton County, Pennsylvania.

(b) The following defendants (collectively referred to herein as the "Management Directors") were Directors of Piper and held the following positions with Piper until the date indicated, if any, of termination:

| Director | Title | Termination |
|---|---|---|
| William T. Piper, Jr. .... | Chairman of the Board and President | Resigned as Chairman August 12, 1969 |
| Thomas F. Piper ..... | Vice President | Resigned as a Director August 12, 1969 |
| Howard Piper ..... | Executive Vice President | Resigned as a Director August 12, 1969 |
| Charles W. Pool ..... | Treasurer | Resigned as a Director August 12, 1969 and as Treasurer November 6, 1969 |
| Walter C. Jamouneau ... | Secretary | Resigned as a Director and as Secretary August 12, 1969 |



(c) The Piper Board of Directors is presently constituted as follows:

| Name | Other positions and offices with Piper | Principal occupation or employment |
|---|---|---|
| Nicholas M. Salgo ..... | Chairman of the Board | Chairman of the Board Bangor Punta Corporation |
| David W. Wallace ..... | Assistant Vice President | President and Chief Operating Officer, Bangor Punta Corporation |
| W. Gordon Robertson ... | None | General Trustee of Bangor Punta's Employee Benefit Program |
| Dudley C. Phillips ..... | Assistant Vice President— Assistant Secretary | Vice President and General Counsel, Bangor Punta Corporation |
| W. T. Piper, Jr. ..... | President | President Piper Aircraft Corporation |
| C. Leonard Gordon ..... | None | Vice President and General Counsel Chris-Craft Industries, Inc. |
| Lawrence R. Barnett .... | None | Vice President Chris-Craft Industries, Inc. |
| James J. Rochlis ..... | None | Executive Vice President Chris-Craft Industries, Inc. |

5. Chris-Craft owns 697,495 shares of Piper common stock, constituting approximately 42% of Piper's issued and outstanding shares of stock.

6. (a) Defendant Bangor Punta Corporation ("Bangor Punta"), a Delaware corporation, is publicly held. Shares of Bangor Punta's common and preferred stock are traded on the NYSE. Bangor Punta presently owns approximately 838,156 shares of Piper stock, constituting approximately 51% of Piper's issued and outstanding shares of stock. Bangor Punta has been exercising working control over the affairs and policies of Piper since August 1969.

(b) Defendant Nicholas M. Salgo is the Chairman of the Board and defendant David W. Wallace is the President and a director of Bangor Punta.

(c) Defendants Harry S. Baker, Robert L. Chambers, James S. Garvey, William E. Hill, Curtis M. Hutchins, George S. Jones, Frederick H. Kingsbury, Jr., Walter B. McKinney, W. Gordon Robertson, George H. Seal, Robert G. Stone, W. Jerome Strout, James G. Tremaine and Harry C. Wood were the other members of the Board of Directors of Bangor Punta in May 1969.

7. Defendant The First Boston Corporation ("First Boston") is an investment banking corporation doing business in the City, County and State of New York. Defendant Paul L. Miller is the President of First Boston and defendant N. Bayard is an officer, employee or agent thereof. First Boston, Miller and Bayard acted as the agents of the Management Directors, the Piper family and of Bangor Punta in bringing about the transactions complained of herein.

## COUNT ONE

*Background*

8. Piper is a publicly held corporation engaged in the manufacture of light aircraft. The capital stock of Piper consists of 5,000,000 authorized shares of $1.00 par value common stock, of which approximately 1,644,790 shares are issued and outstanding. Piper's stock was listed on the NYSE from 1957 until delisted during 1969 and is now registered on the Philadelphia-Baltimore-Washington Stock Exchange ("PBWSE").

9. On January 23, 1969, Chris-Craft publicly announced (a) that it had acquired a stock interest in Piper, (b) that it was making an offer (the "Chris-Craft tender offer") to all Piper shareholders to purchase 300,000 shares of Piper stock at a price of $65 a share, and (c) that Chris-Craft proposed to take additional steps to acquire sufficient shares to obtain control of Piper. On the day preceding these announcements, the closing price of Piper on the NYSE was $52.50.



10. In willful violation of the securities laws, the Management Directors conspired among themselves and with others, including First Boston and Bangor Punta, to perpetuate themselves in control of Piper and to interfere with Chris-Craft's offers to purchase Piper stock in at least the following respects:

(a) making, in communications disseminated to Piper's shareholders, the investment community and the public at large, untrue statements of material facts and omitting to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;

(b) engaging in acts, practices and courses of business, which have operated and are now operating as a fraud upon Chris-Craft, the other shareholders of Piper, the investment community and the public, and employing devices, schemes and artifices to defraud such persons;

(c) engaging in manipulative and deceptive contrivances and practices to manipulate downward the price at which shares of the stock of Chris-Craft traded on the NYSE, and to manipulate upward the price at which shares of Piper and Bangor Punta traded on the NYSE;

(d) illegally offering to sell securities of Piper and Bangor Punta, through the use of a prospectus and otherwise, when no registration statement was in effect as to such securities; and

(e) illegally purchasing securities of Piper which carried with them the right to purchase securities of Bangor Punta in which a distribution was then being made, at the times and in the manner set forth in Count Three herein.

One of the effects of such acts and courses of conduct was to mislead Chris-Craft and the public as to the true value of Piper stock.

11. In furtherance of said conspiracy, the defendants have engaged in the acts described below, among others, in which the mails, means and instrumentalities of interstate commerce, and the facilities of the NYSE have been used.

*The Chris-Craft Tender Offer*

12. On January 24, 1969, Chris-Craft made its tender offer to the shareholders of Piper for 300,000 or more shares of Piper stock for cash at $65 per share. For the purpose of interfering with Chris-Craft's tender offer and depriving Piper shareholders of the opportunity to evaluate the offer on its merits, the Management Directors sent, through the mails, letters to the shareholders of Piper, including shareholders in the Southern District of New York, which stated, among other things:

(a) by letter dated January 27, 1969: "Your Board of Directors has carefully studied this [Chris-Craft] offer and is convinced that it is inadequate and not in the best interests of Piper shareholders"; "Piper's stock has traded as high as $72.25 on the New York Stock Exchange within the past eight months"; and "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher";

(b) by letter dated January 28, 1969: "Your management firmly believes that this [Chris-Craft] offer is inadequate and not in the best interests of Piper shareholders."

13. The aforesaid letters were false and misleading, and known to be such by the Management Directors, in that they:

(a) concealed the fact that First Boston, Piper's investment banker, had advised Piper that the price of $65 a share was a fair price for a shareholder to receive for his Piper stock;



(b) concealed the fact that during the summer of 1968, when Piper stock had traded as high as $72.25 on the NYSE, the Management Directors regarded the price as so attractive that some of them sold their own Piper stock, and thereafter the stock had declined to as low as $50.875 a share;

(c) concealed the fact that the Management Directors controlled approximately 10% more of the outstanding stock of Piper than had been disclosed in filings with the Securities and Exchange Commission ("SEC");

(d) concealed the fact that the Management Directors had planned as early as August 1968 to oppose any attempts by outsiders to acquire control of Piper regardless of any benefits that might accrue to Piper and its shareholders and that no serious discussions or study was had of Chris-Craft's offer;

(e) failed to state that Piper's sales had dropped by over 10% in the first quarter of fiscal 1969 from sales in the first quarter of fiscal 1968, and that Piper's earnings had dropped by almost 30% compared to the equivalent quarter of the prior year, which facts were known to the Management Directors prior to January 27, 1969 but not disclosed until January 29, 1969;

(f) concealed the fact that the Management Directors had discussed and expressed concern about the deteriorating financial condition, production and engineering capabilities of Piper, including the facts that (i) the market for single engine aircraft was deteriorating, (ii) Piper could not afford to develop new markets, (iii) manufacturing at Lock Haven was in a confused state and unable to meet schedules, (iv) engineering schedules had not been met for years, (v) significant changes in Piper's management and systems were re-

quired before sales could be increased, and (vi) the morale of employees at Piper's main plant was at a low point and worsening;

(g) concealed the fact that one of Piper's more popular aircraft, designated as the PA-30 and known as the Twin Comanche, almost 2,000 of which were sold since 1964, had an unsatisfactory safety record which had caused and was continuing to cause materially sharp increases in the cost of insurance and would require an expensive retrofit program, in addition to other adverse consequences therefrom;

(h) concealed the fact that its efforts to design a plane, to be known as the Pocono, for the rapidly expanding commuter aircraft market were not successful, that the plane never had adequate power, and that there was a substantial prospect, which came to pass in late August 1969, that the project would have to be abandoned, leaving idle a plant which had been constructed at great cost to manufacture the Pocono.

*The Transaction With Grumman*

14. In a further effort to interfere with Chris-Craft's tender offer, on January 29, 1969 the Management Directors caused Piper to announce through interstate news media and the mails (for dissemination to their shareholders and the public, including persons in the Southern District of New York) that Grumman Aircraft Engineering Corporation ("Grumman") had "agreed to purchase 300,000 shares of [Piper's] authorized but unissued common stock at $65 per share." Piper's announcement further stated:

> "The sales agreement is subject to various conditions, including that the shares be listed on the New York Stock Exchange, that there be no material adverse change in the business of Piper and that there be no change in control of Piper."



15. Piper's announcement of the Grumman transaction was false and misleading in that it failed to disclose, among other things, that:

(a) Grumman had the right, in its unilateral discretion, to sell back the stock to Piper over a seven month period (hereinafter the "option period") at a price of $65 per share, plus interest;

(b) during the option period, Piper was precluded under the agreement from using or commingling the funds for the 300,000 shares of Piper stock, while Grumman was free during the option period to hold and vote the Piper shares;

(c) because of the fact that the agreement amounted in effect to no more than an option, the Management Directors and First Boston knew that the 300,000 Piper shares to be issued to Grumman during the option period could not be listed on the NYSE, a necessary condition to the agreement;

(d) consummation of the agreement with Grumman would be in violation of Section 7 of the Clayton Act (15 U.S.C. § 18); and

(e) the Grumman transaction was designed to interfere with Chris-Craft's tender offer and to manipulate downward and depress the market price of Chris-Craft stock on the NYSE.

16. The agreement with Grumman, which was brought about by First Boston, Miller and Bayard, was illusory and one-sided. It was intended as, and operated as, a fraudulent scheme and artifice to interfere with Chris-Craft's tender offer, to manipulate the price of Chris-Craft stock downward and the price of Piper stock upward, and to make the shareholders of Piper less likely to sell their shares to Chris-Craft.

17. As a result of the foregoing announcements and conduct by the Management Directors, First Boston, Miller and

Bayard, Chris-Craft was caused to believe that its investment in Piper stock was worth $65 per share, it acquired fewer shares of Piper stock under its tender offer than it would have acquired in the absence of such fraudulent conduct and the market price of Chris-Craft was artificially manipulated downward from the price of $51.50 a share at which it was trading when Chris-Craft first announced its interest in Piper.

18. After Chris-Craft's tender offer had terminated on February 3, 1969, Piper and Grumman announced that their agreement had been terminated.

*Chris-Craft's Registration Statement for its Exchange Offer*

19. On February 27, 1969 Chris-Craft filed its registration statement and form of prospectus with the SEC in connection with its exchange offer to Piper's shareholders (the "Chris-Craft exchange offer") by which Chris-Craft proposed to offer to exchange certain of its own securities for 300,000 Piper shares, with the right to buy an additional 100,000 shares. Chris-Craft reserved the right to terminate its offer, among other reasons, upon any material increase in the aggregate number of outstanding shares of Piper stock or material change in the capitalization of Piper.

20. Since the consideration to be received by Piper's shareholders who delivered their shares to Chris-Craft consisted of securities of Chris-Craft, the Management Directors and First Boston knew that any decline in the price of Chris-Craft's stock would adversely affect the offer, as would any increase in the number of Piper shares outstanding.

*The U.S. Concrete and Southply Transactions*

21. On March 22, 1969, while Chris-Craft's registration statement was under review at the SEC, the Management



Directors, at the insistence of First Boston, caused Piper to enter into:

(a) an agreement with United States Concrete Piper Company ("U.S. Concrete") and Pittsburgh Coke & Chemical Company ("Pittsburgh Coke") whereby Piper would acquire all of the outstanding shares of their subsidiary, United States Concrete Pipe Company of Florida ("U.S. Concrete Florida") in exchange for 320,000 shares of authorized but unissued common stock of Piper; and

(b) an agreement with certain stockholders of Southply, Inc. ("Southply") under which Piper would acquire 99.466% of the outstanding shares of Southply in exchange for 149,199 shares of authorized but unissued stock of Piper.

22. The 149,199 shares which Piper agreed to issue for the stock of Southply had a market value, based on the last price on the NYSE, of over $10,600,000. Southply's net worth as of December 31, 1969 was minus $10,582 and it had sustained net losses in 1968 of $58,499 and in 1967 of $529,671. The stock which Piper agreed to issue for Southply had a value of at least $10,000,000 in excess of the value of Southply.

23. The 320,000 shares of Piper stock which Piper agreed to issue for the acquisition of U.S. Concrete Florida had an aggregate value of approximately $22,800,000 based on the last price on the NYSE. In its annual financial statement, issued to stockholders on March 21, 1969, only one day before the agreement with Piper, Pittsburgh Coke represented that U. S. Concrete, including its subsidiary U. S. Concrete Florida, had a fair value, based on underlying net assets, of only $16,535,000 and that in an attempted disposition the price might well be less. In addition, eight private treble damage antitrust actions were pending against U. S.

Concrete involving the very business which Piper agreed to buy. The stock which Piper agreed to issue for U. S. Concrete Florida had a value of at least $7,000,000 in excess of the value of U. S. Concrete Florida.

24. At the time they caused Piper to enter into the agreement for the acquisition of Southply and U. S. Concrete Florida, the Management Directors, First Boston, Miller and Bayard were aware of the provisions of Piper's Listing Agreement with the NYSE and of the applicable rules of the NYSE, by which it was necessary (a) for a listing application to be approved by the NYSE prior to the issuance of Piper stock to U. S. Concrete and to the shareholders of Southply, and (b) for the proposed issuance to be authorized by Piper's shareholders before any application would be approved by the NYSE.

25. The agreements for the purchase of Southply and U.S. Concrete Florida were fraudulently entered into for the purpose of interfering with Chris-Craft's exchange offer and were intended to have the effect of diluting Piper's stock so as to keep control of Piper in the Management Directors and make it impossible for the exchange offer to succeed. The agreements constituted a device and artifice to manipulate the price of Chris-Craft downward and to defraud Chris-Craft and other purchasers of Piper stock who relied upon Piper's Listing Agreement with the NYSE and the obligations of the Management Directors to adhere to the NYSE rules prohibiting such dilution of the shareholders' interest without their approval.

26. The Management Directors, First Boston, Miller and Bayard were well aware that the shareholders of Piper would not approve the issuance of the 469,199 shares of Piper stock for U.S. Concrete Florida and Southply, and that this transaction could not, therefore, be consummated under the NYSE rules and Piper's Listing Agreement.



27. Nevertheless, intent only on blocking Chris-Craft's exchange offer, the Management Directors, First Boston, Miller and Bayard on or about March 24, 1969, in knowing and willful violation of the NYSE rules and the Listing Agreement, caused Piper to issue the 469,199 shares of Piper stock in exchange for Southply and U.S. Concrete Florida without seeking or obtaining the approval of Piper's shareholders and without the approval of a listing application for such shares by the NYSE. When Bankers Trust Company, Piper's sole Registrar, refused to register the new issue of Piper stock and Manufacturers Hanover Trust Company, Piper's sole Transfer Agent, refused to issue certificates of the stock, the Management Directors caused Piper to issue spurious certificates to U.S. Concrete and the Southply Shareholders.

28. On March 31, 1969 Chris-Craft brought an action in the Supreme Court of the State of New York, County of New York, against Piper, the Management Directors, and others to enjoin or rescind the issuance of the aforesaid 469,199 shares of Piper, in which action a temporary restraining order was entered enjoining the further consummation of such transactions and preventing the issuance of Piper stock without prior NYSE approval.

29. On April 3, 1969, after the Management Directors refused to take any steps to rescind the issuance of said shares, the NYSE Board of Governors directed that trading in Piper's stock be suspended and that a delisting application be filed forthwith with the SEC, and announced that Piper had violated its Listing Agreement and the NYSE rules.

30. Such NYSE action was deliberately brought about by the Management Directors, with the assistance of First Boston, Miller and Bayard, for the purposes of (a) depriving Chris-Craft and the other shareholders of Piper of

the benefits of NYSE listing, (b) discouraging Chris-Craft from proceeding with its exchange offer and causing the processing of the Chris-Craft exchange offer to be delayed by the SEC until the Southply and U.S. Concrete Florida transactions could be rescinded and Piper readmitted to trading on the NYSE, and (c) manipulating downward the price of Chris-Craft so that its exchange offer would be unsuccessful, or at least more costly.

31. On or about April 14, 1969 Piper rescinded its acquisition of Southply and U.S. Concrete Florida and the purported issuance of 469,199 Piper shares. As a result of this action which Chris-Craft had demanded, effective April 21, 1969 the NYSE ended its suspension of trading in Piper stock, and withdrew its delisting proceedings against Piper.

*Piper's Issuance of False and Misleading Financial Statements*

32. On or about April 29, 1969 the Management Directors caused Piper to issue and publicly announce a false and misleading financial statement for the six months ended March 31, 1969. Said financial statement represented that Piper's per share earnings were the same as the equivalent 1968 period when in fact they were materially less, which distortion was accomplished by the adoption of a new accounting method to raise earnings in 1969 without stating that a comparable adjustment was not being made in the 1968 figures and by the deliberate deferral of certain material losses to a later reporting period.

*Entry of Bangor Punta into Conspiracy*

33. On May 7, 1969 Chris-Craft defined and publicly announced the terms of its exchange offer to buy 300,000 shares of Piper stock with the right to buy an additional 100,000 shares which, if successful, would have given Chris-Craft a majority of Piper's issued and outstanding stock.



In exchange for each share of Piper stock, Chris-Craft proposed to offer one share of new Chris-Craft $2 preferred stock and two warrants to buy one share each of Chris-Craft common stock.

34. In further pursuit of their aforesaid plan and scheme, the Management Directors, First Boston, Miller and Bayard, having failed in their other efforts to stop Chris-Craft from making its exchange offer, enlisted defendants Bangor Punta, Salgo and Wallace and the other Bangor Punta directors in their unlawful scheme to interfere with and render unsuccessful Chris-Craft's exchange offer.

35. On May 8, 1969 the defendants caused Piper and Bangor Punta to issue press releases and statements (hereinafter the "Piper-Bangor Punta announcement") to be disseminated through the means and instrumentalities of interstate commerce, including in the Southern District of New York, wherein it was stated (1) that Bangor Punta had agreed to acquire more than 500,000 shares of Piper stock from the Piper family, (2) that the agreement is a first step in a proposed consolidation of Bangor Punta and Piper, (3) that under the agreement and exchange offer the shareholders of Piper would receive a "package of Bangor Punta securities to be valued in the judgment of First Boston Corp. at not less than $80 per Piper share," (4) that the "sales of the combined companies would reach $450,000,000 in fiscal 1969 with about $180,000,000 or 40% in the aircraft, recreational and leisure time fields," and (5) that Bangor Punta was to make an "exchange offer," while also stating that a "merger" of the two companies would bring Bangor Punta into the light aircraft business.

36. The Piper-Bangor Punta announcement was false and misleading in that it failed to disclose:

(a) that Bangor Punta, the Piper family and First Boston did not intend that the package of securities to

be offered to the Piper shareholders would have a market value or resale value of $80 per Piper share and knew that the package would have to consist primarily of marginal and unlisted securities, such as warrants and debentures, exercisable and convertible at prices far in excess of the market value of Bangor Punta common stock;

(b) that an offering of Bangor Punta securities in exchange for shares of Piper could be made only by registration statement filed with and cleared by the SEC;

(c) that no registration statement had been filed by Bangor Punta with the SEC and that, when filed, it would take a considerable amount of time for clearance;

(d) that the announcement itself was a violation of SEC rules, including Rule 135, and, as a result, subjected Bangor Punta to sanctions;

(e) that although the press release suggested that there would be a merger of Piper and Bangor Punta the directors of Piper had not even been asked to consider an agreement with Bangor Punta, or told that such an agreement was pending; and

(f) that the Piper family would receive a bonus for its stock, that could exceed $13,000,000, if they succeeded in persuading the independent shareholders of Piper not to tender their shares to Chris-Craft, but to sell or tender sufficient shares to Bangor Punta to give it more than 50% of the outstanding shares of Piper.

37. So eager were defendants to interfere with Chris-Craft's exchange offer, as described in Chris-Craft's May 7, 1969 announcement, that they issued the aforesaid May 8, 1969 announcement without even waiting for all the parties to execute the May 8 agreement. In order to induce several members of the Piper family subsequently to execute the



May 8 agreement, defendants William T. Piper, Jr., Howard Piper and Thomas F. Piper, with the assistance of First Boston, entered into a secret side-agreement by which such family members were guaranteed a cash resale value for the Bangor Punta securities received by them in the exchange offer in an amount not less than a value to be confidentially placed on such securities by First Boston.

38. The Piper-Bangor Punta announcement, and the understandings of the defendants with respect thereto, were designed for the purpose of interfering with Chris-Craft's exchange offer and were calculated to have and did have the effect of artificially manipulating downward the price at which shares of Chris-Craft were traded on May 8, 1969 from a high of $48.25 per share to a low of $44.50 per share, while causing the price of both Piper and Bangor Punta to increase, thus adversely affecting Chris-Craft's exchange offer.

*Parking Arrangements for Piper Stock*

39. Prior to May 8, 1969 in violation of SEC Rule 10b-5 and interpretations of the rule upon which defendants claimed to rely in making the May 8 announcement, defendant Salgo secretly tipped at least one broker to the fact that Bangor Punta intended to enter into an agreement with the Piper family to seek control of Piper. Such advance information was given for the purpose of (a) enabling the broker to purchase Piper stock on the open market for resale to Bangor Punta, (b) depriving Chris-Craft of the opportunity of acquiring said shares on its exchange offer, and (c) assuring Bangor Punta in advance of its agreement with the Piper family that it would be able to secure working control of Piper to the detriment of Chris-Craft. Piper shares acquired as a result of such advance information were in fact resold to Bangor Punta and not tendered to Chris-Craft.

40. After the May 8, 1969 announcement, the defendants, or some of them, continued to encourage others to purchase

shares in the open market with the understanding that they would be resold to Bangor Punta and not tendered to Chris-Craft.

*Illusory Market Strength of Bangor Punta Stock*

41. For the purpose of providing artificial support to the value of Bangor Punta common stock, between the May 8, 1969 announcement and the close of Bangor Punta's exchange offer, at least the major institutional creditor and equity holder of Bangor Punta, which was in a control position, purchased 160,000 shares or more of Bangor Punta common stock on the open market in scattered transactions to create the impression that broad-based market strength existed for such securities.

*Recommendations by the Piper Family*

42. By means of misleading communications, following May 8, 1969, Piper and the Management Directors, with the knowledge and at the request of Bangor Punta, engaged in efforts to induce the shareholders of Piper to tender their shares to Bangor Punta rather than to Chris-Craft, to wit:

(a) By letter dated June 4, 1969 on the letterhead of Piper signed by defendant W. T. Piper, Jr., as Chairman and President of Piper, Piper described the terms of Bangor Punta's exchange offer contained in its preliminary prospectus dated May 29, 1969, and urged them: "In your own interests . . . to read and study this material carefully."

(b) By letter dated June 20, 1969, on the letterhead of Piper and signed by defendant W. T. Piper, Jr., all Piper shareholders were advised that the Executive Committee of Piper believed that the Chris-Craft offer "is not in your best interests and you should therefore continue to reject it." The letter went on to make specific criticisms of the Chris-Craft exchange offer, and stated in bold print that no member of Piper's management would accept the Chris-Craft offer.



(c) By letter dated July 25, 1969 and signed by defendant W. T. Piper, Jr., Piper's shareholders were told that the Piper Board of Directors "strongly recommend that you accept the Bangor Punta offer" which became effective on July 18, 1969 and that "a combination with Bangor Punta is in the best interests of all the shareholders." Piper's shareholders were further told not to hesitate to telephone defendant First Boston, and even provided its number in New York.

43. The aforesaid letters were misleading in material respects in that they failed to disclose:

(a) that under the terms of the May 8, 1969 agreement the Piper family stood to gain over $13,000,000 from promoting the Bangor Punta offer over the Chris-Craft offer and by inducing Piper shareholders to tender or otherwise sell to Bangor Punta a majority of Piper's outstanding stock;

(b) that the side-agreement described in paragraph 37 herein had been entered into which guaranteed a select group of family members a certain resale value for the Bangor Punta securities to be received by them;

(c) that the principal members of Piper's management were under a contractual obligation to tender to Bangor Punta, and could not therefore consider acceptance of the Chris-Craft offer;

(d) that Piper's financial analysts had concluded that the Bangor Punta offer was detrimental to the interests of Piper; and

(e) that criticisms which Piper made of the Chris-Craft exchange offer, such as that it was a fully taxable

transaction and required an irrevocable proxy, also applied to the Bangor Punta offer.

44. The Management Directors also caused Piper to hire at Piper's expense but for their benefit a proxy solicitation firm to urge Piper's shareholders not to tender to Chris-Craft but to tender to Bangor Punta. Said firm, acting on behalf of the Piper family, Piper and Bangor Punta at the same time, emphasized that the Piper management favored the Bangor Punta offer but failed to disclose the facts described above and repeated misleading statements contained in Bangor Punta's prospectus.

*The Misleading Bangor Punta Prospectuses*

45. The defendants sought to induce, and did induce, Piper shareholders to accept the Bangor Punta exchange offer, and to reject the Chris-Craft exchange offer, by means of false and misleading preliminary and final prospectuses dated May 29, 1969 and July 18, 1969, respectively, which were disseminated to all Piper shareholders.

46. Said prospectuses were prepared by Bangor Punta, and information on Piper was supplied by Piper and by the Management Directors. First Boston acted on both sides of the transaction, was designated in the prospectuses as "Dealer-Manager" of the exchange offer and consented to the use of its name on said prospectuses with the intention that it be relied upon by the Piper shareholders.

47. The preliminary and final prospectuses were false and misleading in material respects, including the following:

(a) The prospectuses reported that Bangor Punta, on a consolidated basis, had a shareholders equity of $120,081,338, without disclosing that the consolidated assets had been overstated by approximately $22,000,000, representing about 20% of its net worth and including a



$14,000,000 overstatement of the assets of the Bangor and Aroostook Railroad. On or about December 2, 1969, after it had acquired over 50% of the stock of Piper, Bangor Punta announced that for the year ended September 30, 1969, it had written off or down approximately $22,000,000 in assets carried on its financial statements in the July 18, 1969 prospectus.

(b) The prospectuses carried the assets of the Bangor and Aroostook Railroad at $19,000,000, and described the railroad as a going business without disclosing that it was negotiating to sell the railroad, and had reached an agreement in principle with a buyer to sell the railroad for only $5,000,000, subject to approval of Bangor Punta's Board of Directors and the Interstate Commerce Commission, which agreement was not to be finalized or disclosed until the exchange offer was completed.

(c) The prospectuses described the May 8, 1969 agreement between the Piper family and Bangor Punta without disclosing that the secret side-agreement described in paragraph 37 herein had been entered into guaranteeing said members of the Piper family a certain cash resale value not disclosed to or made available to other members of the Piper family or to the public shareholders of Piper. Said side-agreement was not revealed to plaintiff until April 1970, when it was subpoenaed from a member of the Piper family.

(d) The prospectuses did not disclose the inherent conflict of interest of First Boston in that it was acting as Dealer-Manager for Bangor Punta and as agent for Piper and the Piper family and was to pass upon the value of the securities package to be offered to the public. This conflict of interest acted to the great detriment of Chris-Craft and the public in that First Boston did not act in accordance with its obligations under the se-

curities laws when it did not make or require disclosure of the secret side-agreement described in paragraph 37 herein or the confidential opinion which it was asked to give and gave pursuant to and in furtherance of that agreement.

(e) The prospectuses failed to disclose the safety problems relating to the operation of the Piper PA-30 airplane and that it would be necessary for Piper to undertake a retrofit of the almost 2,000 such aircraft in the hands of the public.

(f) The prospectuses failed to disclose that, in part as a result of the accident rate of the PA-30, Piper's insurance premium had been materially increased. To conceal this fact, premium expense which therefore had been shown separately was lumped into general administrative expense.

(g) The prospectuses failed to disclose that serious difficulties had been encountered in the production of the Pocono, which would require the termination of plans to produce this model and the idling of a $2,000,000 plant constructed to produce it.

(h) The prospectuses repeated the misleading comparison, described at paragraph 32 herein of the six-month earnings for 1969 with the six-month earnings for 1968, without disclosing that expenses properly chargeable to the six-month 1969 period were being allocated to a later period not shown in the prospectus. It was not disclosed that, using the same accounting method for the first six months of 1969 as had been used for 1968 earnings, Piper's earnings would have been materially lower for the first six months of 1969.

(i) The prospectuses did not fairly show the dilution in Bangor Punta's earnings which would result from the warrants to be issued pursuant to the exchange offer.



(j) The prospectuses failed to disclose the effect that Bangor Punta's cash purchases of shares of Piper stock between May 14 and May 23, 1969 had in the marketplace, as alleged in Count Three herein.

48. In its final prospectus Bangor Punta made a disclaimer for the first time that "No guarantee of, or representation as to, the value of the securities and/or cash offered by Bangor Punta pursuant to the Exchange Offers is or can be made."

49. Although the press release which implanted the notion that the offer would be worth $80 a share, and the preliminary prospectus which perpetuated it had been given wide circulation for several months, Bangor Punta set a closing date of merely five business days for its exchange offer so that Piper shareholders would be pressured into tendering their stock to Bangor Punta and rejecting the Chris-Craft exchange offer without discovering that the market value of the Bangor Punta exchange offer was substantially less than the promised $80 a share.

50. In fact, at no time after the effective date of its exchange offer did the Bangor Punta securities package have a market value of as much as $80 a share, and even on the date the exchange offer closed on July 29, 1969 its value had declined to approximately $70.

51. By reason of the foregoing acts and misrepresentations, Bangor Punta received from the public on its exchange offer 111,628 shares of Piper which otherwise would not have been tendered to it and might have been tendered to Chris-Craft. These shares, together with the Piper family shares and the 120,200 shares of stock unlawfully acquired for cash as described in Count Three herein, gave Bangor Punta working control of Piper, which was accomplished by the reconstitution of the Piper Board of Directors referred to in paragraph 4 herein.

*Post-Exchange Offer Purchases*

52. After the expiration of its exchange offer, and with working control of Piper, Bangor Punta continued to purchase shares of Piper stock for cash in transactions arranged by the Management Directors in furtherance of their efforts to obtain a bonus of up to $13,000,000 under the May 8, 1969 agreement. Bangor Punta also secretly purchased shares of Piper stock on the PBWSE until it acquired a majority of Piper outstanding stock.

53. In such manner, subsequent to August 8, 1969 Bangor Punta purchased for cash approximately 103,975 of Piper stock, which increased its percentage interest in Piper from approximately 45% to approximately 50.9% of the outstanding Piper shares.

## COUNT TWO

54. Chris-Craft repeats the allegations of paragraphs 1 through 7, 35, 38, and 48 through 51, as if the same were set forth at length herein.

55. The Piper-Bangor Punta May 8, 1969 announcement was made at a time when no registration statement covering the Bangor Punta securities to be exchanged was in effect and constituted the use of means or instruments of interstate commerce to offer to sell such securities through the use of a prospectus or otherwise, in violation of Section 5 of the Securities Act of 1933, as amended, and Rule 135 promulgated thereunder.

56. The defendants were well aware that the SEC had recently, in a well-publicized ruling, adopted sanctions against a company making an exchange offer which had made an announcement of a less inflammatory nature than the Piper-Bangor Punta announcement. With this knowledge, the defendants willfully and maliciously caused the announcement to be issued in order to interfere with the Chris-Craft exchange offer.



## COUNT THREE

57. Chris-Craft repeats the allegations of paragraphs 1 through 53, as if the same were set forth at length herein.

58. On April 7, 1969, at a meeting called by the SEC, the staff of the SEC informed Chris-Craft (a) that any further purchases by Chris-Craft of shares of Piper stock, other than by means of the exchange offer, would be regarded by the SEC as in willful violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder, and would subject it to the penalties for willful violation of securities laws, (b) directed Chris-Craft not to purchase shares of Piper stock during the pendency of its exchange offer and (c) informed Chris-Craft that Piper was being advised that this same warning and direction applied to shares of Piper stock by it, its management and by any third parties acting in concert with any of them.

59. Chris-Craft made no purchases of shares of Piper stock from the time it received the directive from the SEC on April 7, 1969 until after the close of its exchange offer.

60. Bangor Punta, between May 14 and May 23, 1969, acted in willful violation of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-6 thereunder, and purchased 120,200 shares of Piper stock, thereby gaining a decided advantage over Chris-Craft in the struggle for control of Piper.

61. In response to Bangor Punta's illegal cash purchases of 120,200 Piper shares, the price at which Piper stock was trading on the NYSE increased between May 14 and May 23, 1969 from approximately $72.50 to a high of $77.50, causing many Piper shareholders to assume that the price increase had resulted solely from the bullish effect of Bangor Punta's exchange offer on the market and to decide to tender to Bangor Punta rather than to Chris-Craft under its competing tender offer.

RELIEF UNDER ALL COUNTS

62. As a result of the foregoing acts and courses of conduct, Bangor Punta ultimately acquired 838,156 shares of Piper, or 50.9% of Piper's outstanding stock. It has thus secured the power to elect a majority of the Board of Directors, to declare or withhold dividends, to appoint officers and to dominate completely Piper's affairs, even to the extent of causing a merger or issuing new shares of stock without the consent of the other shareholders.

63. Chris-Craft owns 697,495 of Piper stock, or 42.6% of Piper's outstanding stock, acquired at a cost of over $45,000,000 in cash and in the value of its securities.

64. The foregoing acts and courses of conduct by the defendants misled Chris-Craft and caused it to buy shares of Piper at prices substantially in excess of their true value, required Chris-Craft to incur substantial costs and expenses to protect its interest in Piper and sharply decreased the value of Chris-Craft's holdings in Piper, which has caused Chris-Craft damages of at least $44,000,000.

65. But for the unlawful acts of the defendants described herein, Chris-Craft would have achieved control of Piper, or at least the price of Piper common stock during 1969 would not have been at the artificially high level to which it was driven by defendants' unlawful conduct.

66. Chris-Craft has no adequate remedy at law.

WHEREFORE, Chris-Craft demands judgment:

1. Enjoining and restraining defendant Bangor Punta and all persons acting on its behalf from voting all shares of Piper which it acquired in violation of the securities laws subsequent to May 8, 1969, as long as such shares of Piper stock are held directly or indirectly by Bangor Punta.



2. Requiring Bangor Punta to divest, by public auction or in such other manner as the Court may prescribe, all shares of Piper stock acquired by it in violation of the securities laws, including (a) the 120,200 shares purchased between May 14 and 23, 1969, (b) approximately 111,628 shares acquired pursuant to its July 18, 1969 exchange offer and (c) approximately 103,975 shares acquired subsequent to August 8, 1969.

3. Requiring defendants to pay to Chris-Craft compensatory damages to be determined by the Court and estimated as of the date of this complaint to be no less than $44,000,000, together with punitive damages in the amount of $1,000,000.

Dated: New York, N. Y.
June 9, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

/s/ ARTHUR L. LIMAN
Arthur L. Liman

/s/ JOSEPH J. ACKELL
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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*
*—against—*
PIPER AIRCRAFT CORPORATION, *et al.*,
*Defendants.*
} 69 Civ. 2227 : MP

## ANSWER AND COUNTERCLAIM OF CERTAIN DEFENDANTS TO SECOND AMENDED COMPLAINT

Defendants Piper Aircraft Corporation (hereinafter referred to as "Piper") and Thomas F. Piper, William T. Piper, Jr. and Howard Piper, (hereinafter referred to as the "Piper defendants"), answering the second amended complaint herein:

### FIRST DEFENSE TO COUNT ONE

1. Deny each and every allegation contained in paragraph 1 of the second amended complaint, except admit that plaintiff purports to bring this action under the statutes and rules therein cited.

2. Deny each and every allegation contained in paragraphs 2, 10, 11, 13, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30, 32, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52 and 53 of the second amended complaint.

3. Admit the allegations contained in paragraphs 3, 4 and 8 of the second amended complaint.

4. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the second amended complaint, except admit that Chris-Craft Industries, Inc. ("Chris-Craft") owns some shares of Piper common stock.



*Answer and Counterclaim of Piper Defendants To Second Amended Complaint*

5. Deny each and every allegation contained in the last sentence of paragraph 6(a) of the second amended complaint. Admit the allegations contained in the first three sentences of paragraph 6(a) and paragraphs 6(b) and 6(c) of the second amended complaint.

6. Admit the allegations contained in the first two sentences of paragraph 7 of the second amended complaint. Deny each and every allegation contained in the third sentence of paragraph 7 of the second amended complaint.

7. Deny each and every allegation contained in paragraph 9 of the second amended complaint, except admit that on or about January 23, 1969, Chris-Craft, for the first time, publicly announced that it had acquired shares of Piper common stock and proposed making a tender offer for 300,000 shares of Piper common stock at $65 per share, with a view to control of Piper, and that the closing price of the Piper common shares on the New York Stock Exchange on January 22, 1969 was $52.50 per share.

8. Deny each and every allegation contained in paragraph 12 of the second amended complaint, except admit that on or about January 24, 1969, Chris-Craft made a tender offer to shareholders of Piper for 300,000 shares of Piper common stock at $65 per share, and that Piper sent letters to its shareholders dated January 27 and January 28, 1969, and refer to those letters for the full contents thereof.

9. Deny each and every allegation contained in the first sentence of paragraph 14 of the second amended complaint. Admit the second sentence of paragraph 14 of the second amended complaint.

10. Deny each and every allegation contained in paragraph 18 of the second amended complaint, except admit

that the agreement between Piper and Grumman Aircraft Engineering Corporation was terminated by mutual consent on or about March 18, 1969.

11. Deny each and every allegation contained in paragraph 19 of the second amended complaint, except admit that on February 27, 1969, Chris-Craft filed a Form S-1 with the Securities and Exchange Commission by which Chris-Craft proposed to offer to exchange unspecified amounts of certain of its securities for shares of Piper common stock, and refer to the Form S-1 for the full terms and provisions thereof.

12. Deny each and every allegation contained in paragraph 28 of the second amended complaint, except admit that on or about March 31, 1969, Chris-Craft instituted an action against Piper, the Piper defendants and others in the Supreme Court of the State of New York, County of New York and refer to the pleadings and order therein for the full contents thereof.

13. Deny each and every allegation contained in paragraph 29 of the second amended complaint, except admit that trading in Piper common stock was suspended on the New York Stock Exchange commencing April 7, 1969.

14. Deny each and every allegation contained in paragraph 31 of the second amended complaint, except admit that the transactions with South Ply and U. S. Concrete Pipe Company of Florida were rescinded on April 14, 1969 and that the suspension of trading in Piper common stock was terminated effective April 21, 1969.

15. Deny each and every allegation contained in paragraph 33 of the second amended complaint, except admit that on or about May 7, 1969, Chris-Craft announced that it



had filed an amendment to the S-1 previously filed with the Securities and Exchange Commission and refer to such announcement and amendment for the full terms and conditions of the exchange offer referred to.

16. Deny each and every allegation contained in paragraph 35 of the second amended complaint, except admit that on May 8, 1969, Piper and Bangor Punta issued press releases and refer to such releases for the full contents thereof.

17. Deny each and every allegation contained in paragraph 46 of the second amended complaint, except admit that prospectuses were prepared by Bangor Punta and information on Piper was supplied by Piper and that First Boston was designated in the prospectuses as "dealer-manager".

18. Deny each and every allegation contained in paragraph 48 of the second amended complaint except admit that the final prospectus was filed and refer to such prospectus for the full terms and provisions thereof.

FIRST DEFENSE TO COUNT TWO

19. Repeat the admissions and denials herein with respect to paragraphs 1 through 7, 35, 38 and 48 through 51 of the second amended complaint as though set forth herein at length.

20. Deny each and every allegation contained in paragraphs 55 and 56 of the second amended complaint.

FIRST DEFENSE TO COUNT THREE

21. Repeat the admissions and denials herein with respect to paragraphs 1 through 53 of the second amended complaint as though set forth herein at length.

22. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 58 and 59 of the second amended complaint.

23. Deny each and every allegation contained in paragraphs 60 and 61 of the second amended complaint.

SECOND DEFENSE TO ALL COUNTS

24. Deny each and every allegation contained in paragraphs 62, 63, 64, 65 and 66 of the second amended complaint.

THIRD DEFENSE TO ALL COUNTS

25. The allegations of the second amended complaint fail to state a claim or claims against Piper or the Piper defendants upon which relief can be granted.

FIRST AFFIRMATIVE DEFENSE

26. By reason of the wrongful and unlawful conduct of Chris-Craft hereafter set forth, Chris-Craft enters this court with unclean hands and is barred from any relief demanded in the second amended complaint.

SECOND AFFIRMATIVE DEFENSE

27. After Chris-Craft announced the aforementioned cash tender offer in January 1969, Piper became aware of the prior corporate history of Chris-Craft and its management and, acting in the best interests of all the Piper shareholders, decided that the acquisition of control of Piper by Chris-Craft would not be in the best interests of the Piper shareholders. Piper therefore undertook to oppose Chris-Craft's attempts to acquire control of Piper, the Piper defendants rejected Chris-Craft's offers to them of personal



advantage in exchange for co-operation with Chris-Craft's take over attempt, and Piper searched for corporate opportunities which would promote the interests of all Piper shareholders.

THIRD AFFIRMATIVE DEFENSE

28. Chris-Craft is estopped from recovering herein as it failed to take appropriate steps to mitigate its alleged damages.

COUNTERCLAIM

29. Beginning at least as early as October 1968 Chris-Craft its officers and directors and its financial advisors have undertaken and engaged upon an unlawful conspiracy, plan and scheme in contravention of the federal securities laws and other applicable federal statutes and regulations, including Sections 5, 10, 12 and 17 of the Securities Act of 1933 (15 U.S.C. § 77(a) *et seq.*) ("the 1933 Act"), Sections 7, 9, 10, 13 and 14 of the Securities Exchange Act of 1934 (15 U.S.C. § 78(a) *et seq.*) ("the 1934 Act") and Sections 3, 7, and 17 of the Investment Company Act of 1940 (15 U.S.C. § 80 a-1 *et seq.*) ("the 1940 Act") and the rules promulgated thereunder with respect to each such act. The purpose of such unlawful conspiracy, plan and scheme was to acquire control of Piper and to merge or otherwise consolidate Chris-Craft and Piper in a manner favorable to Chris-Craft and contrary to the best interests of Piper and its shareholders.

30. This counterclaim is asserted pursuant to Rule 13 of the Federal Rules of Civil Procedure.

31. Jurisdiction of this court is based on Section 22 of the 1933 Act, Section 27 of the 1934 Act and Section 43 of the 1940 Act. The acts and transactions complained of herein occurred, in whole or in part, within the Southern District of New York.

32. Pursuant to the aforementioned conspiracy, plan and scheme, Chris-Craft has undertaken the following overt acts, among others:

(a) Secretly acquired shares of Piper common stock from a registered investment company in a negotiated transaction without prior approval of the SEC in violation of Section 17 of the 1940 Act;

(b) Disclosed the aforementioned conspiracy, plan and scheme, together with other confidential information to representatives of the registered investment company, without making similar disclosure to the public; and

(c) Failed to fully and publicly disclose in press releases, in public documents filed with the SEC, in its December 1968 Debenture prospectus, or in its January 1969 tender offer its true intentions with respect to Piper, its lack of financial ability to undertake the acquisition of Piper, its intention to elect persons previously selected by it as directors of Piper, and other material facts.

CHRIS-CRAFT'S ACQUISITION OF
STOCK PRIOR TO ITS TENDER OFFER

33. Commencing on or about December 30, 1968 and ending prior to January 23, 1969, Chris-Craft acquired about 99,400 shares of Piper's common stock in the open market by purchases on the New York Stock Exchange. These securities were purchased through a secret numbered brokerage account at Mitchell Hutchins & Co. which was established at least as early as November 1968 for the express purpose of purchasing Piper stock.

34. On January 23, 1969, Chris-Craft in a negotiated transaction purchased 101,100 shares of Piper's common



stock from Technology Fund, Inc., an investment company registered under the 1940 Act. Chris-Craft did not, prior to purchasing Piper's stock from the registered investment company, seek or obtain the order of the SEC required by the 1940 Act exempting from the Act Chris-Craft's aforesaid purchase.

CHRIS-CRAFT'S SCHEDULE 13D FILING
WITH THE COMMISSION AND PIPER
PRIOR TO THE TENDER OFFER

35. On January 23, 1969 Chris-Craft filed with the SEC a document entitled "Schedule 13D—Information To Be Included in Statements Filed Pursuant to Rule 13d-1 or 14d-1", dated January 22, 1969 (hereinafter "Schedule"). That Schedule, together with subsequent amendments thereto, was materially deficient in the following respects:

(a) Item 3 of the Schedule, entitled "Source and Amount of Funds or Other Consideration", was false and misleading and omitted material facts concerning (1) the specific source of the funds used by Chris-Craft to acquire the shares of Piper stock, (2) the amount of the proceeds of Chris-Craft's December 1968 public offering used for such acquisitions, (3) the amount of bank and other credit used for such acquisitions, (4) the amount of the proceeds from the aforementioned public offering available to pay for tendered shares and (5) the amount Chris-Craft expected, or would have, to borrow to finance its purchase of tendered shares, and the terms and conditions of such proposed borrowings;

(b) Item 4 of the Schedule, entitled "Purpose of Transaction", was false and misleading and failed to describe Chris-Craft's proposed steps and purpose to effectuate its aforementioned overall plan with respect to Piper: and

(c) Item 5 of the Schedule, entitled "Interest in Securities of the Issuer", was false and misleading and failed to disclose that Chris-Craft purchased shares of Piper's stock from an "institutional investor" in a negotiated transaction at a time when Chris-Craft was an affiliated person of that investor. Chris-Craft also failed to disclose that prior SEC approval of that transaction was required under the 1940 Act.

CHRIS-CRAFT'S PRESS RELEASE

36. On January 23, 1969 Chris-Craft issued a press release which announced its "Offer to Purchase" up to 300,000 shares of Piper's common stock at $65 per share. The release was designed to, and did solicit proxies in support of Chris-Craft's unlawful plan. The release constituted a solicitation of proxies without appropriate compliance with the filing and disclosure requirements of the SEC's proxy rules.

CHRIS-CRAFT'S TENDER OFFER

37. On January 24, 1969 and on numerous dates thereafter Chris-Craft caused to be published in newspapers of wide general circulation and transported by the mails and interstate commerce, an "Offer to Purchase" up to, and possibly more than, 300,000 shares of Piper's common stock, at a price of $65 per share.

38. The "Offer to Purchase" required transmittal of an irrevocable proxy with the tendered shares and constituted an overt solicitation by Chris-Craft of proxies without compliance with the proxy rules of the SEC.

39. The "Offer to Purchase" further stated that

> "Chris-Craft is purchasing the Piper shares for investment with a view to control of Piper, but it does not presently have any specific plan or proposal to liquidate Piper, to acquire control of Piper, to sell its assets or to merge with any other companies or to make any other major change in its business or corporate structure. If this Offer is successfully completed, Chris-Craft will give consideration to some form of combination between it and Piper."



That statement was false and misleading and omitted to disclose the material fact that Chris-Craft did have a specific plan and was implementing it in attempting to elect its nominees as directors at Piper's 1969 annual meeting in order to acquire control of Piper and to combine with it.

40. As a result of the proxy solicitation contained in the "Offer to Purchase", Chris-Craft obtained purported proxies covering more than 300,000 shares and voted the same at Piper's 1969 annual meeting in violation of Rule 14a-4 of the SEC's proxy rules.

CHRIS-CRAFT'S LETTER OF JANUARY 28, 1969

41. Commencing on or about December 30, 1968 and continuing to February 3, 1969, Chris-Craft acquired approximately 140,000 shares of Piper's common stock in the open market. Chris-Craft intentionally did not demand or request from the sellers of such shares, at the time of acquiring them, either as part of its contract or otherwise, the execution of proxies by the shareholders of record on January 3, 1969 to vote such shares at Piper's 1969 annual meeting.

42. On January 28, 1969 Chris-Craft addressed letters to the shareholders of record of such shares. Such letters were false and fraudulent in that they stated that Chris-Craft, rather than the sellers of such shares, should be entitled to vote them at Piper's 1969 annual meeting, that

the New York Business Corporation Law imposed a duty on the record holder of shares to issue to Chris-Craft, upon demand, a proxy to vote such shares and that Chris-Craft was entitled to make such a demand, despite the fact that Piper is a Pennsylvania corporation and not subject to the New York Business Corporation Law.

43. The aforesaid letters were calculated to result and did result in the procurement by Chris-Craft, from the shareholders of record who received such letters, the execution of proxies which Chris-Craft voted in favor of its nominees for directors at Piper's 1969 annual meeting.

CHRIS-CRAFT'S EXCHANGE OFFERS

44. On February 27, 1969, in furtherance of the aforementioned conspiracy, plan and scheme, Chris-Craft filed a Registration Statement and form of Prospectus, Form S-1 with the SEC. The S-1 was subsequently amended and became effective on May 15, 1969. Thereafter Chris-Craft filed a second Registration Statement and form of Prospectus which prospectus became effective July 24, 1969.

45. The said Registration Statements and Prospectuses were false, misleading and deficient in many material respects and failed to disclose material facts, including, among others, the following:

(a) The actual earnings of Chris-Craft on a per share basis;

(b) The accurate pro forma financial information with respect to Piper and Chris-Craft;

(c) The source of the funds utilized by Chris-Craft to acquire shares of Piper common stock and the terms and conditions of the loan or loans made by Chris-Craft to obtain such funds;



(d) The prior corporate history of Chris-Craft and its management to the extent hereafter set forth;

(e) The absence of any study by Chris-Craft of the aircraft manufacturing industry, including Piper's role and position therein and its capital requirements;

(f) The inability of Chris-Craft to manage and operate Piper's business without qualified personnel experienced in the design, manufacture, sale and distribution of general aviation aircraft;

(g) The fact that Chris-Craft's offer to exchange Chris-Craft securities for Piper common stock would, if less than majority control is acquired, result in Chris-Craft becoming an investment company within the meaning of Section 3(a) of the Investment Company Act of 1940 and subject to all the restrictions therein and that the exchange offer constitutes a violation of Section 7 of said Act;

(h) The fact that in February 1969, Chris-Craft borrowed the sum of $15,000,000 from a national bank under circumstances which constituted a violation of Regulation U of the Board of Governors of the Federal Reserve System issued pursuant to Section 7(d) of the Securities Exchange Act of 1934;

(i) The lack of any plan for the repayment by Chris-Craft of such $15,000,000 loan, which repayment can be compelled upon demand by the bank;

(j) The fact that Chris-Craft, prior to the effective date of its exchange offer, intended to bring, and thereafter during the pendency thereof, did bring, an action against Piper and others demanding damages in the sum of $45,000,000, which action places Chris-Craft directors, who also purport to act as directors of Piper,

in a conflict of interest which requires them to resign as directors of Piper;

(k) The fact that the merger of Chris-Craft and Baldwin-Montrose Chemical Co. consummated in the spring of 1968 was in violation of the federal securities laws;

(l) The fact that Chris-Craft had decided to sell its industrial division for 19 million dollars;

(m) The fact that during the period beginning February 27, 1969 and continuing until at least April 7, 1969, Chris-Craft, in violation of Rule 10b-6, unlawfully continued to solicit the purchase of shares of Piper common stock until compelled to desist by the SEC;

(n) The fact that Chris-Craft as presently constituted, is the result of numerous mergers with viable corporations, the business of many of which is no longer being carried on by Chris-Craft;

(o) The fact that after the merger with, or acquisition of, such viable corporations, Chris-Craft's management disposed of the productive business and assets of such other corporations, and that such disposition was frequently at a loss as, for example, occurred in the case of Baldwin Rubber Company and General Artists Corporation;

(p) The fact that the purchasers of the productive business and assets of the merged or acquired corporations, in some instances, were financed by officers of Chris-Craft or the corporation itself as, for example, occurred in the case of Centlivre Brewing Co. and General Artists Corporation;

(q) The fact that Chris-Craft's management frequently used the assets of Chris-Craft to acquire stock interests in other corporations after which Chris-



Craft's officers and directors became directors of such other corporation but, upon meeting resistance to a take over of such other corporation, disposed of the stock at a profit, as occurred, for example, in the case of Paramount Pictures Corporation;

(r) The fact that the history of the management of Chris-Craft has been one of utilizing the assets of Chris-Craft and its predecessor corporations for their self-aggrandisement in a manner inconsistent with the best interests of the stockholders of such corporations; and

(s) The fact that Chris-Craft's management is actually dominated and controlled by three officers who make all decisions for the corporations as though it were their own private proprietorship without prior consultation or consideration by the Board of Directors as, for example, occurred when said officers decided to invest over $35,000,000 of the corporation's capital in Piper stock without prior approval by the Board of Directors.

MARKET MANIPULATION

46. As a further part of Chris-Craft's plan and scheme to take over control of Piper, Chris-Craft engaged in manipulative and deceptive practices designed to tie up shares of Piper stock and to create active trading in Chris-Craft securities in order to make its offers appear more attractive. Pursuant to such plan and scheme Chris-Craft:

(a) Disclosed to certain large investors that it intended to take over Piper;

(b) Advised certain brokerage houses of its intention to take over Piper and arranged to have them contact large investors and persuade such investors to purchase shares of Chris-Craft. Such investors did, in fact, purchase Chris-Craft shares on the New York

Stock Exchange in many small transactions resulting in a substantial increase in the price of Chris-Craft's stock creating the impression of market strength.

CHRIS-CRAFT'S UNLAWFUL FINANCING

47. Commencing in October, 1968 in furtherance of its aforementioned plan Chris-Craft made arrangements to borrow approximately $15,000,000 in transactions from a bank or group of banks as defined in Section 3(a) of the 1934 Act and Section 3(K) of Regulation U (12 CFR § 221.1 *et seq.*) issued pursuant to Section 7(d) of the 1934 Act. These arrangements culminated in a loan to Chris-Craft in February, 1969 which loan was "purpose credit" secured directly or indirectly by stock as defined by Regulation U. The amount of the loan was in excess of the maximum loan value permitted by Regulation U and in violation of said Regulation. The lending bank or banks knew that the loan was to be used to purchase Piper stock and that it was unlawful.

48. Pursuant to the aforementioned conspiracy, plan and scheme, Chris-Craft has instituted numerous actions and proceedings for the purpose of publicly announcing the substance of the allegations therein in order to thwart the efforts of Piper to protect the interests of Piper shareholders by resisting Chris-Craft's take over attempts and for the purpose of depressing and manipulating the market price of the Piper common stock in order to enable Chris-Craft to take over Piper on terms more favorable to Chris-Craft than to the Piper shareholders.

WHEREFORE, Piper and the Piper defendants demand judgment:

1. Dismissing the second amended complaint together with costs and disbursements of this action.



2. Requiring Chris-Craft to divest in whatever manner the Court may deem proper all shares of Piper stock acquired by it in violation of the securities laws, including (a) the approximately 101,000 shares acquired from Technology Fund, (b) the approximately 304,600 shares acquired pursuant to its cash tender offer, (c) the approximately 9,100 shares acquired in the open market prior to April 7, 1969, (d) all shares purchased with the proceeds of the sale of its convertible subordinated debentures and its unlawful bank loan and (e) all shares acquired under its false and misleading exchange offer.

3. Enjoining and restraining Chris-Craft and all persons acting on its behalf from voting all shares of Piper acquired by it in violation of the securities laws, as long as such shares are held directly or indirectly by Chris-Craft.

4. Awarding such damages resulting from the conduct complained of in the counterclaim as may be found and determined by the court.

5. Granting such other and further relief as the court may deem just and proper.

Dated: New York, New York
September 1, 1970

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By ZACHARY SHIMER
A Member of the Firm

*Attorneys for Defendants Piper Aircraft Corporation, Thomas F. Piper, William T. Piper, Jr. and Howard Piper*
25 Broadway
New York, New York 10004
Telephone No. 344-8900

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*
*—against—*
PIPER AIRCRAFT CORPORATION, *et al.*,
*Defendants.*

68 Civ 2227 : MP

## ANSWER TO SECOND AMENDED COMPLAINT

Defendants The First Boston Corporation, Paul L. Miller and N. Bayard, by their attorneys Sullivan & Cromwell, for their answer to the second amended complaint:

### FIRST DEFENSE TO COUNT ONE

1. Deny each and every allegation contained in paragraph 1 of the second amended complaint, except admit that plaintiff purports to bring this action under the statutes and rules therein cited.

2. Deny each and every allegation contained in paragraphs 2, 10, 11, 13, 16, 17, 20, 21, 22, 24, 25, 26, 27, 30, 34, 36, 37, 38, 45, 47, 49 and 51 of the second amended complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 32, 39, 41, 42, 43, and 44 of the second amended complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the second amended complaint, except admit that Chris-Craft Industries, Inc. ("Chris-Craft") owns shares of Piper Aircraft Corporation ("Piper") common stock.



*Answer of First Boston Defendants to Second Amended Complaint*

5. Deny each and every allegation contained in paragraph 6(a) of the second amended complaint, except admit that defendant Bangor Punta Corporation ("Bangor Punta"), a Delaware corporation, is publicly held, and that its common and preferred stock trade on the NYSE.

6. Deny each and every allegation contained in paragraph 7 of the amended complaint, except admit that defendant The First Boston Corporation ("First Boston") is a corporation doing business in the City, County and State of New York engaged in, among other things, investment banking, and that Paul L. Miller is the President and N. Bayard a Vice President thereof.

7. Deny each and every allegation contained in paragraph 9 of the second amended complaint, except admit that Chris-Craft made a public announcement on January 23, 1969, and refer to the announcement for the terms thereof, and further admit that the closing price of the Piper common shares on the New York Stock Exchange on January 22, 1969 was $52.50 per share.

8. Deny each and every allegation contained in paragraph 12 of the second amended complaint, except admit that on or about January 24, 1969, Chris-Craft made a tender offer to shareholders of Piper stock, and that Piper sent letters to its shareholders dated January 27 and January 28, 1969, and refer to such offer and letters for the full contents thereof.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the second amended complaint, except admit that Piper issued an announcement on January 29, 1969, and refer to the text of the announcement for the contents thereof.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the second amended complaint, except deny that First Boston knew that the 300,000 shares to be issued to Grumman could not be listed on the NYSE, admit that the agreement between Piper and Grumman contained provisions with regard to the stock and proceeds, and refer to the text of the agreement for the terms thereof.

11. Deny each and every allegation contained in paragraph 18 of the second amended complaint, except admit that the agreement between Piper and Grumman Aircraft Corporation was terminated by mutual consent on or about March 18, 1969.

12. Deny each and every allegation contained in paragraph 19 of the second amended complaint, except admit that on February 27, 1969, Chris-Craft filed a registration statement with the Securities and Exchange Commission regarding a proposed exchange offer, and refer to the registration statement for the terms of the proposed offer.

13. Deny each and every allegation contained in paragraph 23 of the second amended complaint, except admit that Pittsburgh Coke issued a report to the shareholders on or about March 21, 1969, and refer to the report for the contents thereof.

14. Deny each and every allegation contained in paragraph 28 of the second amended complaint, except admit that on or about March 31, 1969, Chris-Craft instituted an action against Piper, the Piper defendants and others in the Supreme Court of the State of New York, County of New York and refer to the pleadings and order therein for the full contents thereof.

15. Deny each and every allegation contained in paragraph 29 of the second amended complaint, except admit





that trading in Piper common stock was suspended on the New York Stock Exchange commencing April 7, 1969.

16. Deny each and every allegation contained in paragraph 31 of the second amended complaint, except admit that the transactions with South Ply and U.S. Concrete Pipe Company of Florida were rescinded on April 14, 1969 and that the suspension of trading in Piper common stock was terminated effective April 21, 1969.

17. Deny each and every allegation contained in paragraph 33 of the second amended complaint, except admit that on or about May 7, 1969, Chris-Craft announced that it had filed an amendment to the S-1 previously filed with the Securities and Exchange Commission and refer to such announcement and amendment for the full terms and conditions of the exchange offer referred to.

18. Deny each and every allegation contained in paragraph 35 of the second amended complaint, except admit that on May 8, 1969, Piper and Bangor Punta issued press releases and refer to the text of said releases for the matters contained therein.

19. Deny each and every allegation contained in paragraph 40 of the second amended complaint, except deny knowledge or information sufficient to form an opinion as to the truth of the allegations with regard to the other defendants.

20. Deny each and every allegation contained in paragraph 46 of the second amended complaint, except admit that prospectuses were prepared by Bangor Punta, that information on Piper was supplied by Piper, and that First Boston was designated in the prospectuses as "dealer-manager," and deny knowledge or information sufficient to form a belief as to whether the information on Piper was supplied by Management Directors.

*Answer of First Boston Defendants to Second Amended Complaint*

21. Deny each and every allegation contained in paragraph 48 of the second amended complaint, except admit that the final prospectus was filed and refer to such prospectus for the full terms and provisions thereof.

22. Deny knowledge or information sufficient to form an opinion as to the truth of the allegations contained in paragraph 50 of the second amended complaint, except aver that the package of Bangor Punta securities had a value of at least $80 a share on the effective date of the Bangor Punta exchange offer.

23. Deny knowledge or information sufficient to form an opinion as to the truth of the allegations contained in paragraphs 52 and 53 of the second amended complaint, except admit that after the expiration of its exchange offer and subsequent to August 8, 1969, Bangor Punta purchased additional shares of Piper stock for cash.

## FIRST DEFENSE TO COUNT TWO

24. Repeat the admissions and denials herein with respect to paragraphs 1 through 7, 35, 38 and 48 through 51 of the second amended complaint as though set forth herein at length.

25. Deny each and every allegation contained in paragraphs 55 and 56 of the second amended complaint.

## FIRST DEFENSE TO COUNT THREE

26. Repeat the admissions and denials herein with respect to paragraphs 1 through 53 of the second amended complaint as though set forth at length herein.

27. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 58, 59, 60 and 61 of the second amended complaint.



*Answer of First Boston Defendants to Second Amended Complaint*

## FIRST DEFENSE TO ALL COUNTS

28. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the second amended complaint.

29. Deny each and every allegation contained in paragraphs 63, 64, 65 and 66 of the second amended complaint.

## FIRST AFFIRMATIVE DEFENSE TO ALL COUNTS

30. The amended complaint fails to state a claim on which relief can be granted against The First Boston Corporation, Paul L. Miller, or N. Bayard.

## SECOND AFFIRMATIVE DEFENSE TO ALL COUNTS

31. Plaintiff enters this Court with unclean hands and is therefore barred from obtaining any relief under the second amended complaint, because in connection with its acquisition of Piper stock and its proposed exchange offers:

(a) It purchased Piper stock with the proceeds of a loan or loans obtained in violation of Regulation U of the Board of Governors of the Federal Reserve System;

(b) It purchased Piper stock from a registered investment company in a negotiated transaction without prior approval of the Securities and Exchange Commission in violation of Section 17 of the Investment Company Act of 1940;

(c) It purchased Piper stock in violation of Rule 10b-6 of the Securities and Exchange Commission;

(d) It filed with the Securities and Exchange Commission, in connection with its tender offer of Janu-

ary 23, 1969, a Schedule 13(d) which was false, fraudulent and misleading;

(e) It filed with the Securities and Exchange Commission a registration statement and prospectus which became effective on May 15, 1969, and a second registration statement and prospectus which became effective on July 24, 1969, which in the form they became effective were false, fraudulent and misleading, in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

WHEREFORE, defendants The First Boston Corporation, Paul L. Miller and N. Bayard demand judgment:

A. Dismissing the amended complaint and awarding them the costs and disbursements of this action, and

B. Granting such other and further relief as may be just.

Dated: New York, New York
September 15, 1970

SULLIVAN & CROMWELL

By JOHN F. ARNING
(A Member of the Firm)

*Attorneys for defendants*
*The First Boston Corporation,*
*Paul L. Miller and N. Bayard,*
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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

CHRIS-CRAFT INDUSTRIES, INC.,
*Plaintiff,*
*—against—*
PIPER AIRCRAFT CORPORATION, *et. al.,*
*Defendants.*
} 69 Civ. 2227 : MP

## REPLY TO COUNTERCLAIM

Plaintiff Chris-Craft Industries, Inc. ("Chris-Craft") by its attorneys, for its reply to the counterclaim of defendants Piper Aircraft Corporation ("Piper") and Thomas F. Piper, William T. Piper, Jr. and Howard Piper (the "Piper defendants"):

1. Denies each and every allegation contained in paragraphs 29, 32, 45, 46, 47 and 48.

2. Denies that it has knowledge and information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 30 and 31, except admits that the Piper defendants purport to assert their counterclaim pursuant to Rule 13 of the Federal Rules of Civil Procedure, and that the Piper defendants purport to base jurisdiction on certain provisions of federal law.

3. Denies each and every allegation contained in paragraph 33, except admits that from December 30, 1968 to January 23, 1969 Chris-Craft purchased shares of Piper common stock through a member in good standing of the New York Stock Exchange ("NYSE"), which member in accordance with its own practices and not at the suggestion of Chris-Craft assigned Account No. 100 to such account. In further answer, Chris-Craft alleges that substantially less than 98,600 shares of Piper common stock, and less than 5% of the outstanding shares of Piper stock, had been delivered

to Chris-Craft's custody and control by January 22, 1969, and Chris-Craft did not have the power to vote 5% of Piper's stock on January 22, 1969.

4. Answering paragraph 34 of the complaint, Chris-Craft admits that on or about January 23, 1969, pursuant to a written agreement, Chris-Craft purchased 101,000 shares of Piper stock from Technology Fund, Inc., an investment company, and that no exemption was sought or obtained, or required to be obtained, from the Securities and Exchange Commission ("SEC") in connection with said purchase, and, except as so admitted, denies each and every allegation of said paragraph.

5. Denies each and every allegation contained in paragraph 35, except admits that it filed a Schedule 13-D with the SEC on January 23, 1969, and refers to said schedule for the terms thereof.

6. Denies each and every allegation contained in paragraph 36, except admits that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock with the right to purchase additional shares at $65 a share (the "tender offer").

7. Admits the allegations contained in paragraph 37.

8. Denies each and every allegation contained in paragraph 38 of the complaint and refers to Chris-Craft's tender offer for the terms thereof.

9. Denies each and every allegation contained in paragraph 39, except admits that the tender offer included the statement quoted in said paragraph, and refers to the tender offer for all of the terms thereof.

10. Denies each and every allegation contained in paragraph 40, except admits that Chris-Craft voted valid proxies



covering more than 300,000 Piper shares at Piper's 1969 annual shareholders meeting.

11. Denies each and every allegation contained in paragraph 41, except admits that Chris-Craft acquired shares of Piper common stock in the open market between December 30, 1968.

12. Denies each and every allegation contained in paragraph 42, except admits that Chris-Craft sent its letter dated January 28, 1969 to the shareholders of Piper, and refers to said letter for the contents thereof.

13. Denies each and every allegation contained in paragraph 43, except admits that Chris-Craft received and voted proxies from Piper shareholders.

14. Denies each and every allegation contained in paragraph 44, except admits that Chris-Craft made a single offering to the shareholders of Piper by its registration statement and preliminary prospectus filed with the SEC on February 27, 1969, and by a second registration statement and form of prospectus which became effective on July 24, 1969, for its registered exchange offer of Chris-Craft securities for shares of Piper stock.

WHEREFORE, Chris-Craft demands judgment herein on its complaint and dismissing the counterclaim of said defendants, together with the costs and disbursements of this action.

Dated: New York, New York
September 24, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

By A. L. LIMAN
*Attorneys for Plaintiff*
345 Park Avenue
New York, New York 10022
(212) 935-8000

**Answer of Bangor Punta Corporation, David W. Wallace and Nicolas Salgo, Defendants in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation, et al.*, 69 Civil 2227 MP**

Upon oral stipulation with Chris-Craft Industries, Inc. and with the approval of the District Court, Bangor Punta Corporation, David W. Wallace and Nicolas Salgo ("defendants") did not file an Answer to the Second Amended Complaint of Chris-Craft Industries, Inc., and it was agreed that defendants' answer consisted of a general denial of all material allegations, except that jurisdiction over both the parties and the causes of action was admitted, and the following affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) lack of capacity to maintain the action and (3) unclean hands and *in pari delicto*, based upon the allegations contained in the Amended Complaint in *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc., et al.*, 69 Civil 2354:MP (*infra.*, pp. F-55 et seq.)



# United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,

*Plaintiff,*

*—against—*

CHRIS-CRAFT INDUSTRIES, INC., LOEB, RHOADES & CO., SHIELDS & COMPANY, INCORPORATED, HERBERT J. SIEGEL, ALFRED L. HOLLENDER, JAMES J. ROCHLIS, HARRY H. COLL, JOHN HOPKINS, C. LEONARD GORDON, LAWRENCE R. BARNETT, VICTOR ORISTANO, WINSLOW MAXWELL, ROBERT B. HUNTER, BERNARD ART, ARMAND G. ERPF, LOUIS C. GOAD, DAVID F. LINOWES, ALVIN R. ROZELLE, and H. V. SHERRILL,

*Defendants.*

69 Civ. 2354

## FIRST AMENDED COMPLAINT

Plaintiff, by its attorneys, Webster Sheffield Fleischmann Hitchcock & Brookfield, complaining of the defendants alleges on information and belief except as to the allegations in paragraphs 1 and 2 herein the following:

### JURISDICTION

1. This Court has jurisdiction of this action pursuant to Section 22 of the Securities Act of 1933 (15 U.S.C. § 77v), Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 72aa), Section 44 of the Investment Company Act of 1940 (15 U.S.C. § 80a-43), and pendant jurisdiction, and the matters in controversy involve a claim of damages in excess of Ten Thousand Dollars ($10,000) exclusive of costs.

## THE PARTIES

2. Plaintiff, BANGOR PUNTA CORPORATION ("Bangor Punta"), is a Delaware corporation with its principal place of business at One Greenwich Plaza, Greenwich, Connecticut, engaged in diverse manufacturing and service businesses with annual sales in excess of $250,000,000 a year. Bangor Punta's securities are listed and traded on the New York Stock Exchange and American Stock Exchange and are owned by more than 15,000 holders.

3. Defendant, CHRIS-CRAFT INDUSTRIES, INC. ("Chris-Craft") is a Delaware corporation with its principal place of business at 600 Madison Avenue, New York, New York. Chris-Craft's securities are listed and traded on the New York Stock Exchange and Pacific Stock Exchange.

4. Defendant Herbert J. Siegel is and at all relevant times was, President and chief executive officer, a director and a controlling person of Chris-Craft. The other individual defendants named herein are, and were at all relevant times, directors, and in some instances, also officers of Chris-Craft.

5. Defendant LOEB, RHOADES & Co. ("Loeb, Rhoades") is a partnership with its principal place of business at 42 Wall Street, New York, New York.

6. Defendant SHIELDS & COMPANY, INCORPORATED ("Shields") is a corporation with its principal place of business at 44 Wall Street, New York, New York.

## THE FACTS

7. PIPER AIRCRAFT CORPORATION ("Piper") is a Pennsylvania corporation with its principal place of business in Lock Haven, Pennsylvania and is recognized as one of the



leading manufacturers of light private aircraft in the United States with annual sales in excess of $97,000,000. At all relevant times, except during the period April 7, 1969 through April 18, 1969, Piper's securities were listed and traded on the New York Stock Exchange.

8. On or about December 30, 1968, there were issued and outstanding approximately 1,641,890 shares of Piper common stock of which 501,090 shares were owned beneficially, or as of record, by the late William T. Piper, Sr., one of the founders of Piper, members of his family and certain oragnizations controlled by them (hereinafter sometimes referred to collectively as the "Piper family"). The principal officers and directors of Piper at that time were members of the Piper family. The balance of the issued and outstanding shares of Piper common stock was held by the public.

9. Chris-Craft is, and at all relevant times was, a so-called conglomerate controlled by the defendant Siegel and his close associates. The defendant Siegel had a reputation in the financial world of being a corporate raider and continually attempting to gain control of other corporations against their wishes and desires. Siegel and his associates made these attempts by means of various schemes, devices and tactics usually involving the acquisition of a significant block of stock of the "target" company, then after gaining a controlling interest in the target company, attempting to force a merger of the operations of such corporations into the operations of Chris-Craft. By following this program of "take over" attempts, the defendant Siegel caused Chris-Craft (formerly known as Baldwin-Montrose Chemical Corporation) to grow in a short period of time from being solely an independent manufacturer of chemicals and automobile floor mats with limited sales, to a conglomerate corporation with diverse and unrelated interests in boats and related craft, broadcasting, television, industrial and agri-

cultural chemicals, and the manufacture of fiber and foam products for the automotive, shoe and women's wear industries, with sales in excess of $90,000,000 in 1968.

10. In or prior to October, 1968, the defendants conceived and concocted a plan and scheme to seek to acquire control of Piper by purchasing or otherwise acquiring Piper common stock for cash or Chris-Craft securities, which plan will be more fully described hereinafter. The defendants planned to follow the same general pattern of previous takeover attempts by Chris-Craft and other companies controlled by defendant Siegel. Siegel and his close associates in Chris-Craft formulated the strategy for this takeover attempt. As will be more fully stated hereinafter, beginning in or at some time prior to October, 1968 and continuing through August 4, 1969, in its attempt to seize control of Piper, Chris-Craft was engaged in a distribution of its securities within the meaning of the Securities Act of 1933 as amended ("1933 Act"), the Securities Exchange Act of 1934 as amended (the "1934 Act"), and the Rules and Regulations of the Securities and Exchange Commission ("SEC") thereunder. The defendants deliberately and intentionally failed to comply fully with the disclosure and registration provisions of the 1933 Act and the 1934 Act but instead used various schemes and devices to conceal their unlawful activities.

11. As the initial step and in furtherance and consummation of its scheme and plan, in or about October, 1968, Chris-Craft caused to be prepared and filed with the SEC a registration statement on Form S-1 and a preliminary prospectus relating to a proposed offer to sell to its own shareholders by subscription, and to the public generally if necessary, a maximum of $26,000,000 principal amount of 6% convertible subordinated debentures in an underwriting managed by the defendants Loeb, Rhoades and Shields.



On December 10, 1968, such registration statement and the final prospectus was declared effective by the SEC. Between December 10, 1968 and December 30, 1968, $21,223,200 of convertible subordinated debentures were sold by Chris-Craft to its shareholders or to the general public through underwriters by means of a prospectus which stated:

> "Such funds [proceeds of debenture sales] will be available for use in connection with further acquisitions and diversification of the Company's business . . . There are, at the present time, no understandings or agreements (. . . ) with respect to any proposed acquisitions and the Company can give no assurances that any such acquisitions will be effected . . . ."

Such statement was materially false and misleading at the time the prospectus was being distributed and used by its shareholders and the general public, as the defendants well knew, because at such time the defendants had already decided to attempt to seize control of Piper and had taken a number of steps in preparation to carry out their scheme in addition to raising funds by the sale of the convertible debentures.

12. In furtherance of the scheme and plan, Chris-Craft, the defendant Siegel and his close associates in or about December, 1968, entered into a conspiracy with certain stock brokerage firms, registered investment companies and other institutional investors, whereby such firms and individuals agreed to acquire or retain, or induce others to acquire or retain, Piper common stock then owned or subsequently acquired by them, and to sell such Piper common stock to Chris-Craft after it completed its offering of its convertible debentures to its shareholders and the public on December 30, 1968.

13. As part of the above-mentioned conspiracy in December, 1968, Chris-Craft and the defendant Siegel and his

close associates caused certain brokerage firms to search out blocks of Piper common stock for the purpose of inducing the holders thereof to sell such blocks on and after December 30, 1968. On or about December 15, 1968, Chris-Craft caused to be set up at a certain brokerage firm a secret account designated "Account No. 100" which secret account was used by Chris-Craft to conceal its transactions in Piper common stock.

14. Commencing on December 30, 1968, and continuing through January 23, 1969, Chris-Craft, using the secret Account No. 100, began acquiring shares of Piper common stock in a series of several large trades over the New York Stock Exchange, from a number of substantial institutional holders of Piper common stock. By January 22, 1969, Chris-Craft had acquired a total of 98,600 shares or approximately 6.01% of the outstanding shares of Piper common stock. All but 3,700 of such shares were held in secret Account No. 100. No shares were delivered to the transfer agent of Piper for a transfer of record to Chris-Craft, or its nominee until January 30, 1969 in order to conceal further the activities of Chris-Craft from Piper and the public.

15. Although the proposed takeover of Piper and Chris-Craft's acts taken in furtherance thereof were material developments, Chris-Craft made no public announcement thereof until January 23, 1969 and instead concealed its activities, although by January 15, 1969 information about the proposed takeover had been leaked to certain brokerage firms and substantial trading and speculation in the securities of Chris-Craft was being conducted by persons with such inside information.

16. Sometime in or about December, 1968, Chris-Craft caused a member of the conspiracy to contact the Technology Fund, Inc., an investment company as defined in Section 3 of the Investment Company Act of 1940 (the "1940 Act") and the holder of approximately 101,000 shares of approximately 6.16% of the outstanding shares of Piper common stock, and to induce Technology Fund to sell its Piper holdings to Chris-Craft. Technology Fund advised Chris-Craft it might be interested in selling its large block of Piper common stock, but only at a price substantially in excess of the then current market price for Piper common stock and not in a transaction over a national securities exchange. Thereafter on or about January 21, 1969, a representative of Technology Fund entered into secret negotiations with the defendants pursuant to which an agreement was reached on January 22, 1969, whereby Technology Fund agreed to sell and did sell its Piper shares to Chris-Craft, receiving a sales price of $65.00 per share for its Piper holdings which sales price was preferential and far in excess of the current market price of Piper common stock offered to or received by any public seller. On January 23, 1969, a written agreement between Technology Fund and Chris-Craft was entered into consummating the sale of Technology Fund's Piper holdings to Chris-Craft. As part of the same transaction, Technology Fund gave to Chris-Craft its proxy to vote the shares of Piper common stock registered in its name at the forthcoming annual meeting of Piper shareholders. Technology Fund further agreed to purchase Chris-Craft securities as more fully described in paragraph 18 hereof. At the time Chris-Craft effected these transactions, both Chris-Craft and Technology Fund were affiliates of Piper as that term is defined in Section 2 of the 1940 Act, as Chris-Craft well knew.



17. During and as part of the above-mentioned negotiations, Technology Fund was informed of the details of Chris-Craft's scheme and plan to obtain control of Piper by means of undisclosed purchases of Piper common stock, followed by a cash tender offer to be made on or about January 23, 1969, and then concluded by a registered exchange offer of Chris-Craft securities for sufficient Piper

common stock to assure domination and control of Piper by Chris-Craft.

18. As a further part of its scheme and plan to seize control of Piper, the defendants through members of their conspiracy disclosed to certain large investors Chris-Craft's program to take over Piper and requested such large investors to assist the defendants in establishing and maintaining a seemingly active market in Chris-Craft's securities over the New York Stock Exchange by purchasing large quantities of Chris-Craft's securities in small lots over a long period of time. Such investors, including Technology Fund, agreed to and did effect such purchases. As a result of these unlawful activities, the market prices of Chris-Craft's securities were artificially inflated and maintained from January 23, 1969 through August 4, 1969 and holders of Piper common stock were induced to tender their shares to Chris-Craft and later to accept its registered exchange offer rather than resist the takeover attempt of Chris-Craft.

19. Concurrently with the aforementioned secret market purchases, the negotiations with Technology Fund for its Piper holdings and unlawful market activity in Chris-Craft's securities transacted by others at the defendants' request, Chris-Craft began preparation for the next step in its scheme and plan to seize Piper, by ordering its attorneys to draft the necessary documents to make the cash tender offer to the public shareholders of Piper pursuant to Section 14(d) of the 1934 Act.

20. On January 23, 1969, in furtherance of its scheme and plan, Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock at a price of $65 per share in the public press and concurrently filed with the SEC a Schedule 13-D with regard to the tender offer pursuant to Sections 13(d) and 14(d) of the 1934 Act.



21. The public announcement and the Schedule 13-D filed by Chris-Craft with the SEC contained a number of material omissions and was deliberately misleading for the purpose of concealing the scope of the scheme and design of Chris-Craft to seize control of Piper, and failed to disclose that Chris-Craft intended to and did purchase 38,900 shares of Piper common stock on the New York Stock Exchange while its tender offer was pending.

22. In furtherance of its scheme and plan to acquire Piper, between January 23, 1969 and February 3, 1969 when Chris-Craft was soliciting tenders of the common stock of Piper, defendant Siegel advised numerous brokers that he was unable to tell them whether Chris-Craft would purchase more than 300,000 shares of Piper common stock pursuant to its tender offer if more than that number of shares were tendered. Such statements were made for the purpose of manipulating and did manipulate and depress the market price of Piper common stock on the New York Stock Exchange to a level substantially below the tender price of $65 so that Chris-Craft could continue to purchase shares of Piper on the open market at a lower price than the tender price. By means of such manipulation Chris-Craft purchased during such period approximately 38,900 shares of Piper common stock at artificially depressed prices.

23. Chris-Craft's cash tender offer expired on February 3, 1969; Chris-Craft purchased approximately 304,600 shares of Piper common stock pursuant to such tender offer.

24. In furtherance of its takeover scheme and plan, Chris-Craft attempted to secure representation on the Piper Board of Directors by obtaining proxies for the annual meeting, originally scheduled for February 4, 1969, with a record date of January 3, 1969. As part of these efforts, on or about January 28, 1969, Chris-Craft demanded proxies from those persons who had sold it large blocks of Piper

common stock in transactions occurring in January, 1969 by sending them letters containing false and misleading statements and omissions, including the false statement that Chris-Craft was entitled under the law to receive proxies therefor from the registered owners of such Piper common stock. At the Piper annual meeting, convened on February 4, 1969, Chris-Craft presented its proxies and the meeting was adjourned until the voting was finalized. At the reconvened meeting on March 25, 1969, defendants Rochlis and Gordon were elected to the Board of Directors of Piper.

25. In and about February, 1969, in furtherance of its scheme and plan, Chris-Craft borrowed the sum of approximately $15,000,000 in one or more transactions from a bank or banks, as defined in Section 3(a) of the 1934 Act and Section 3(k) of Regulation U issued by the Board of Governors of the Federal Reserve System pursuant to Section 7(d) of the 1934 Act ("Regulation U").

26. The above-mentioned Chris-Craft loan was, to the knowledge of the bank or banks, a credit obtained for the purpose of purchasing and carrying securities listed on a national exchange, to wit Piper common stock, and said credit was a "purpose credit" as that term is defined in Regulation U. Such loan was secured directly or indirectly, as such terms are defined in Regulation U, by the shares of Piper common stock purchased. The loan so extended to Chris-Craft was greater than the maximum loan value, as set by the Supplement to Section 4 of Regulation U, of the securities constituting collateral therefor, and consequently, the loan was illegal.

27. In the next step of its scheme and plan, on or about February 27, 1969, Chris-Craft filed with the SEC a Registration Statement on Form S-1 and preliminary prospectus relating to the defendants' planned registered exchange offer of Chris-Craft securities for Piper securities and distributed such preliminary prospectus to the public.



28. Commencing on or about March 18, 1969, Chris-Craft again began to purchase Piper common stock on the open market. Such purchases continued until April 7, 1969, when the SEC ordered Chris-Craft to cease its market purchases of Piper common stock. Approximately 9,100 shares of Piper common stock were purchased by Chris-Craft during this period. In addition, during this period of time, and continuing up until on or about August 4, 1969, Chris-Craft caused certain substantial investors to purchase Piper common stock on the open market and hold such stock for the benefit of Chris-Craft and then tender or sell such stock to Chris-Craft when it was legally permissible to do so. Contemporaneously with the foregoing illegal activity, the defendants continued to induce and persuade large investors to continue to trade in Chris-Craft securities on the open market in order to create an appearance of market strength in Chris-Craft's securities as alleged in paragraph 18 above.

29. Chris-Craft's registered exchange offer became effective on May 19, 1969. The exchange offer was made to the public by means of a prospectus dated May 19, 1969 (the "May 19 prospectus"), which contained material omissions and misstatements of fact, all as set forth more fully below in paragraph 34.

30. The Chris-Craft registered exchange offer made by the May 19 prospectus as modified from time to time after the effective date, was extended through July 22, 1969. No common stock was purchased thereunder by Chris-Craft.

31. A registration statement on Form S-1 and a preliminary prospectus for the second Chris-Craft registered exchange offer was filed with the SEC on July 22, 1969 and became effective on July 24, 1969.

32. The second Chris-Craft registered exchange offer was made by means of a prospectus dated July 24, 1969

(the "July 24 prospectus") which prospectus contained material omissions and misstatements of fact, as more fully set forth in paragraph 34 below.

33. The Chris-Craft registered exchange offer made by the July 24 prospectus remained open through August 4, 1969. Chris-Craft purchased approximately 112,000 shares of Piper common stock thereunder.

34. Chris-Craft's May 19 and July 24 prospectuses, as well as the preliminary prospectuses circulated to the public with regard to such registered exchange offers for Piper common stock, contained the following material omissions and misstatements of fact, among others:

(A) The prospectuses did not disclose defendants' scheme and plan concocted in the fall of 1968 to seize control of Piper, of which the registered exchange offers for Piper common stock were a necessary and integral part.

(B) The prospectuses falsely stated the defendants had no present plans to change the management of Piper, whereas the defendants did in fact have definite plans for a change of management and a reorientation of Piper's business and assets, which plans were the motive for the take-over attempt.

(C) The prospectuses did not disclose that all Chris-Craft's purchases of Piper common stock since December 30, 1968, were illegal, thus making all such acquisitions subject to divestment.

(D) The prospectuses did not disclose that for a period of time commencing on January 23, 1969 and continuing during the pendency of Chris-Craft's exchange offers, defendants caused the market price of Chris-Craft's securities to be improperly influenced and affected by others at the request of Chris-Craft.



(E) The prospectuses did not disclose that Chris-Craft's purchases of Piper common stock were made with funds obtained by an illegal bank loan and the improper use of the proceeds of the sale of its convertible debentures in December, 1968.

(F) The prospectuses misrepresented the true cost of the previous purchases of Piper common stock by Chris-Craft by misstating the true application of the proceeds of the Chris-Craft convertible debenture offering and the $15,000,000 bank loan to such purchases, thereby also distorting the pro forma figures on share dilution contained in the prospectuses.

(G) The prospectuses did not disclose the SEC's order to Chris-Craft in April, 1969 to cease its purchases of Piper common stock on the open market.

(H) The prospectuses did not disclose that, of the dollar amount attributed by Chris-Craft to the purchase of Piper common stock prior to the registered exchange offers, approximately $50,000 was paid to a broker or other person or persons unknown, in violation of the rules of the SEC and the New York Stock Exchange.

(I) The prospectuses did not disclose any of the other violations of law herein set forth.

All of the above misstatements and omissions were material and were known by the defendants to be material, and were made in order to further the scheme and plan of the defendants to takeover control of Piper.

35. By reason of the facts set forth hereinabove, the defendants have violated the following securities laws:

(A) Sections 12 and 17 of the 1933 Act,

(B) Section 7(d) of the 1934 Act and Regulation U

issued by the Board of Governors of the Federal Reserve Board thereunder,

(C) Section 9(a) of the 1934 Act,

(D) Section 10b of the 1934 Act and Rules 10b-5 and 10b-6 thereunder,

(E) Sections 13(d) and 14(d) of the 1934 Act,

(F) Section 17 of the 1940 Act.

36. By reason of the facts set forth hereinabove, the defendants have also violated the fiduciary duties and responsibilities they owe to Piper and the Piper stockholders.

37. By means of the fraudulent and illegal acts set forth above, Chris-Craft has acquired approximately 697,500 shares or 42.48% of the outstanding Piper common stock.

38. By means of negotiated transactions with the Piper family and other holders of large blocks of Piper stock, by a registered voluntary exchange offer and by market purchases made after the completion of its exchange offer, Bangor Punta was able to acquire and now owns 835,750 shares or 50.97% of the outstanding Piper stock.

39. The fraudulent and illegal acts of the defendants have greatly increased the cost of Bangor Punta of the acquisition of such shares of Piper stock.

40. But for the fraudulent and illegal acts of the defendants, Bangor Punta would have been able to acquire by the present time substantially all of the outstanding stock of Piper.

41. By reason of the violations of law and the fraudulent practices described herein, Chris-Craft has damaged Bangor Punta in the amount of at least $50,000,000, and its



acquisition and continued ownership of the approximately 697,500 Piper shares it has acquired by means of such violations and fraudulent practices has constituted and will constitute an irreparable injury to Bangor Punta.

WHEREFORE, plaintiff demands judgment:

(1) Requiring Chris-Craft to pay compensatory damages to plaintiff in the amount of $50,000,000;

(2) Requiring Chris-Craft to divest itself of all shares of Piper:

(a) acquired in violation of Sections 12 and 17 of the 1933 Act;

(b) acquired in violation of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder;

(c) acquired in violation of Section 10(b) of the 1934 Act and Rule 10b-6 thereunder;

(d) acquired in violation of Sections 13(d) and 14(d) of the 1934 Act;

(e) acquired in violation of Section 17 of the 1940 Act;

(f) purchased with the proceeds of the sale of its convertible subordinate debentures;

(g) purchased with the proceeds of the illegal bank loan; or

(h) purchased or otherwise acquired by Chris-Craft in transactions involving Chris-Craft's securities whose price was artificially maintained by Chris-Craft or by others or by Chris-Craft's request:

(3) Enjoining Chris-Craft during the pendency of this action and until completion of the divestiture demanded in

paragraph (2) directly above, from voting, asserting the right to vote or exercising any other incidents of ownerships of all shares of Piper common stock illegally acquired;

(4) Granting plaintiff its costs and disbursements together with reasonable counsel fees;

(5) Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 26, 1970

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD

By JAMES V. RYAN
*Attorneys for Plaintiff*
BANGOR PUNTA CORPORATION
1 Rockefeller Plaza
New York, New York 10020
Tel. No. 582-3370



# United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
*Plaintiff,*
—*against*—
CHRIS-CRAFT INDUSTRIES, INC., et al.,
*Defendants.*
} 69 Civ. 2354 MP

## Answer

Defendant Chris-Craft Industries, Inc. ("Chris-Craft"), by its attorneys, for its answer to plaintiff's first amended complaint:

1. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 1 of the complaint, except admits that in said paragraph plaintiff purports to base jurisdiction of this Court on certain provisions of federal law and upon the principle of pendent jurisdiction and alleges that the amount of controversy exceeds $10,000 exclusive of costs.

2. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 2 of the complaint, except admits that certain of plaintiff's securities are listed and traded on the New York Stock Exchange ("NYSE") and on the American Stock Exchange.

3. Denies each and every allegation contained in Paragraph 3 of the complaint, except admits that Chris-Craft is a Delaware corporation with its principal executive office at 600 Madison Avenue, New York, N. Y., and that certain of Chris-Craft's securities are listed and traded on the NYSE and on the Pacific Stock Exchange.

*Answer of Chris-Craft Industries, Inc.*
*to First Amended Complaint*

4. Denies each and every allegation contained in Paragraph 4 of the complaint, except admits that defendant Herbert J. Siegel is and at all times relevant was President, chief executive officer and a director of Chris-Craft and that the other individual defendants named in the complaint are and were directors, and in some instances, also officers of Chris-Craft.

5. Admits, on information and belief, the allegations contained in Paragraphs 5, 6 and 7 of the complaint.

6. Denies that it has knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 8 of the complaint, except admits that on or about December 30, 1968 the Piper Aircraft Corporation ("Piper") proxy statement dated December 20, 1968 stated that there were issued and outstanding approximately 1,641,890 shares of Piper common stock of which only 325,422 shares were reported to be owned beneficially, or as of record, by the late William T. Piper, Sr., members of his family and certain organizations controlled by them (collectively referred to as the "Piper family"). To the extent that the Piper family owned beneficially or as of record a greater number of Piper shares, that fact was not disclosed in proxy statements issued by the management of Piper or in reports filed with the Securities and Exchange Commission ("SEC") by members of the Piper family pursuant to the requirements of Section 16(a) of the Securities Exchange Act of 1934, and was concealed from the public. Chris-Craft further admits that at or about December 30, 1968 the principal officers and directors of Piper were members of the Piper family and that the shares of Piper stock not owned by the Piper family were held by the public.

7. Denies each and every allegation contained in Paragraph 9 of the complaint, except admits that Chris-Craft



*Answer of Chris-Craft Industries, Inc.*
*to First Amended Complaint*

is a diversified manufacturer with interests in boats, television, industrial and agricultural chemicals and in the manufacture of fiber and foam products, and that its sales in 1968 were in excess of $90 million.

8. Denies each and every allegation contained in Paragraphs 10, 12, 13, 15, 17, 18, 19, 21, 22, 26, 32, 34, 35, 36, 37, 39, 40 and 41 of the complaint.

9. Denies each and every allegation contained in Paragraph 11 of the complaint, except admits that during October 1968 Chris-Craft filed its registration statement for its proposed offer to sell a maximum of $26 million, pursuant to which it sold $21,223,200, principal amount of 6% convertible subordinated debentures and refers to such registration statement for its terms.

10. Denies each and every allegation contained in Paragraph 14 of the complaint, except admits that from December 30, 1968 to January 23, 1969 Chris-Craft purchased shares of Piper common stock through a member in good standing of the NYSE, which member in accordance with its own practices and not at the suggestion of Chris-Craft assigned Account No. 100 to such account. In further answer, Chris-Craft alleges that substantially less than 98,600 shares of Piper common stock, and less than 5% of the outstanding shares of Piper stock, had been delivered to Chris-Craft's custody or control by January 22, 1969.

11. Denies each and every allegation contained in Paragraph 16 of the complaint, except admits that on or about January 23, 1969, pursuant to a written agreement, Chris-Craft purchased 101,000 shares of Piper stock from Technology Fund, Inc., an investment company, at $65 per Piper share, the same price at which Chris-Craft immediately thereafter made a public tender offer to the shareholders of Piper, and that Technology Fund gave Chris-Craft its

proxy to vote the shares of Piper common stock when it sold and delivered those shares to Chris-Craft.

12. Denies each and every allegation contained in Paragraph 20 of the complaint, except admits that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper common stock with the right to purchase additional shares at $65 a share, and that it filed a Schedule 13-D with the SEC on the same date, and refers to said announcement and schedule for the terms thereof.

13. In answer to Paragraph 23 of the complaint, Chris-Craft alleges that its cash tender offer expired on February 3, 1969 and that 304,606 shares of Piper common stock were tendered to Chris-Craft and purchased by it pursuant to such tender offer.

14. Denies each and every allegation contained in Paragraph 24 of the complaint, except admits that at the Piper annual meeting convened on February 4, 1969 Chris-Craft presented its proxies, that the meeting was adjourned until the appointed judges of election finalized the vote and that when the meeting reconvened on March 25, 1969 defendants James J. Rochlis and C. Leonard Gordon were elected to the Board of Directors of Piper.

15. Denies each and every allegation contained in Paragraph 25 of the complaint, except admits that in February 1969 Chris-Craft borrowed $15 million from a bank under a demand note.

16. Denies each and every allegation contained in Paragraph 27 of the complaint, except admits that on or about February 27, 1969 Chris-Craft filed its registration statement and preliminary prospectus with the SEC for its registered exchange offer of Chris-Craft securities for shares of Piper stock.



17. Denies each and every allegation contained in Paragraph 28 of the complaint, except admits that between March 18, 1969 and April 7, 1969 Chris-Craft purchased 9,100 shares of Piper common stock on the open market, and on April 7, 1969 members of the staff of the SEC told Chris-Craft that neither it nor the management of Piper nor any third party acting with or for Piper were permitted to make any further direct or indirect purchases of Piper stock during the pendency of Chris-Craft's exchange offer.

18. Denies each and every allegation contained in Paragraph 29 of the complaint, except admits that Chris-Craft's registered exchange offer became effective on May 19, 1969 and was made to the public by a prospectus dated May 19, 1969.

19. Admits the allegations contained in Paragraphs 30 and 31 of the complaint.

20. Admits the allegations contained in Paragraph 33 of the complaint, except alleges that Chris-Craft purchased 112,089 shares of Piper common stock pursuant to its registered exchange offer made by the July 24, 1969 prospectus.

## FIRST AFFIRMATIVE DEFENSE

21. On information and belief, Bangor Punta did not become a shareholder of Piper or enter into any contracts for the purchase of any shares of Piper until May 8, 1969.

22. Paragraphs 1 through 28 of Bangor Punta's first amended complaint refer to and complain of events alleged to have occurred prior to May 6, 1969.

23. By reason of the foregoing, Bangor Punta does not have standing to complain of any acts or transactions which took place prior to the time it became a shareholder of Piper.

*Answer of Chris-Craft Industries, Inc.*
*to First Amended Complaint*

SECOND AFFIRMATIVE DEFENSE

24. Bangor Punta's first amended complaint alleges claims which arise out of the same transactions and occurrences that are the subject matter of the action commenced by Chris-Craft against Bangor Punta and others in this Court on May 22, 1969 (69 Civ. 2227).

25. By reason of the foregoing, Bangor Punta was required to set forth its claims against Chris-Craft as counterclaims in the aforesaid action commenced by Chris-Craft.

26. Chris-Craft hereby incorporates as an affirmative defense to this action all the allegations of its amended complaint in 69 Civ. 2227 and all allegations that may hereafter be made by it in amended or supplemental pleadings filed in such action.

Dated: New York, N. Y.
March 6, 1970

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON

By JOSEPH J. ACKELL
*Attorneys for defendant*
*Chris-Craft Industries, Inc.*
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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

BANGOR PUNTA CORPORATION,
*Plaintiff,*
—*against*—
CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
*Defendants.*

69 Civ. 2354 MP

## ANSWER

Defendants Loeb, Rhoades & Co. and Shields & Co. Inc., by their attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, answering the first amended complaint herein:

1. Deny knowledge or information sufficient to form a belief as to the truth of any allegations contained in Paragraph 1 of the complaint, except admit that in said paragraph plaintiff purports to base jurisdiction of this Court on certain provisions of federal law and upon the principle of pendent jurisdiction and alleges that the amount of controversy exceeds $10,000 exclusive of costs.

2. Deny knowledge or information sufficient to form a belief as to the truth of any allegation contained in Paragraph 2 of the complaint, except admit that certain of plaintiff's securities are listed and traded on the New York Stock Exchange and on the American Stock Exchange.

3. Deny each and every allegation contained in Paragraph 3 of the complaint except admit that Chris-Craft is a Delaware corporation with its principal executive office at 600 Madison Avenue, New York, New York, and that certain of Chris-Craft's securities are listed and traded on the New York Stock Exchange and on the Pacific Stock Exchange.

4. Deny each and every allegation contained in Paragraph 4 of the complaint except admit that the defendant Herbert J. Siegel is and at all times relevant was President,

chief executive officer and a director of Chris-Craft and that the other individual defendants named in the complaint are and were directors, and, in some instances, also officers of Chris-Craft.

5. Admit, on information and belief, the allegations contained in Paragraphs 7 and 33 of the complaint.

6. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs 8, 14 and 38 of the complaint.

7. Deny each and every allegation contained in Paragraph 9 of the complaint, except admit that Chris-Craft is a diversified manufacturer with interests in boats, television, industrial and agricultural chemicals and in the manufacture of fiber and foam products, and that its sales in 1968 were in excess of $90 million.

8. Deny each and every allegation contained in Paragraphs 10, 12, 13, 18, 19, 32, 34, 35, 36, 37, 39, 40 and 41 of the complaint.

9. Deny each and every allegation contained in Paragraph 11 of the complaint, except admit that during October 1968 Chris-Craft filed its registration statement for its proposed offer to sell a maximum of $26 million, pursuant to which it sold $21,223,200, principal amount of 6% convertible subordinated debentures and refer to such registration statement for its terms.

10. Deny knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs 16 and 17 of the complaint, except admit, on information and belief, that on or about January 23, 1969 Chris-Craft purchased 101,000 shares of Piper stock at $65 per Piper share.



11. Deny, on information and belief, each and every allegation contained in Paragraphs 15, 21, 22 and 26 of the complaint.

12. Deny each and every allegation contained in Paragraph 20 of the complaint, except admit, on information and belief, that on January 23, 1969 Chris-Craft published the announcement of its cash tender offer for up to 300,000 shares of Piper Common Stock with the right to purchase additional shares at $65 a share, and that it filed a Schedule 13-D with the SEC on the same date, and refer to said announcement and schedule for the terms thereof.

13. In answer to Paragraph 23 of the complaint, the defendants admit that Chris-Craft's cash tender offer expired on February 3, 1969 and allege that 304,606 shares of Piper Common Stock were tendered to Chris-Craft and purchased by it pursuant to such tender offer.

14. Deny, on information and belief, each and every allegation contained in Paragraph 24 of the complaint, except admit that at the Piper annual meeting convened on February 4, 1969 Chris-Craft presented its proxies, that the meeting was adjourned until the appointed judges of election finalized the vote and that when the meeting reconvened on March 25, 1969 defendants James J. Rochlis and C. Leonard Gordon were elected to the Board of Directors of Piper.

15. Deny, on information and belief, each and every allegation contained in Paragraph 25 of the complaint, except admit that in February 1969 Chris-Craft borrowed $15 million from a bank under a demand note.

16. Deny each and every allegation contained in Paragraph 27 of the complaint, except admit that on or about February 27, 1969 Chris-Craft filed its registration statement and preliminary prospectus with the SEC for its

registered exchange offer of Chris-Craft securities for shares of Piper stock.

17. Deny each and every allegation contained in Paragraph 28 of the complaint, except admit, on information and belief, that Chris-Craft purchased shares of Piper Common Stock on the open market, and on April 7, 1969 members of the staff of the SEC told Chris-Craft that neither it nor the management of Piper nor any third-party acting with or for Piper were permitted to make any further direct or indirect purchases of Piper stock during the pendency of Chris-Craft's exchange offer.

18. Deny each and every allegation contained in Paragraph 29 of the complaint, except admit that Chris-Craft's registered exchange offer became effective on May 19, 1969 and was made to the public by a prospectus dated May 19, 1969.

FIRST AFFIRMATIVE DEFENSE

19. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. On information and belief, Bangor Punta did not become a shareholder of Piper or enter into any contracts for the purchase of any shares of Piper until May 8, 1969.

21. Paragraphs 1 through 28 of Bangor Punta's first amended complaint refer to and complain of events alleged to have occurred prior to May 8, 1969.

22. By reason of the foregoing, Bangor Punta does not have standing to complain of any acts or transactions which took place prior to the time it became a shareholder of Piper.



THIRD AFFIRMATIVE DEFENSE

23. As to statements made in any registration statements or prospectuses referred to in the first amended complaint, the defendants, after reasonable investigation, had reasonable ground to believe and did believe at the time said registration statements and prospectuses became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Dated: New York, New York
April 27, 1970

CAHILL, GORDON, SONNETT, REINDEL & OHL

By MICHAEL F. ARMSTRONG
A Member of the Firm
*Attorneys for Defendants*
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# United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
*Plaintiff,*

v.

BANGOR PUNTA CORPORATION,
*Defendant.*

} 70 Civ.

## Complaint

Plaintiff, the Securities and Exchange Commission ("the Commission"), for its complaint, alleges upon information and belief:

1. Defendant Bangor Punta Corporation ("Bangor Punta") has engaged and is reasonably likely to engage again in acts and practices which have constituted and will constitute violations of sections 7, 10(a) and 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77g, 77j(a) and 77q(a), as well as section 10(b) of the Securities Exchange Act of 1934 ("Securities Exchange Act"), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

2. The Commission is authorized to bring this action pursuant to section 20(b) of the Securities Act, 15 U.S.C. 77t(b), and section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e). The jurisdiction of this Court is based upon section 22(a) of the Securities Act, 15 U.S.C. 77v(a), and section 27 of the Securities Exchange Act, 15 U.S.C. 78aa.

3. Defendant Bangor Punta, a corporation organized under the laws of the State of Delaware, transacts business within the Southern District of New York.



4. The acts and practices, or some of them, constituting the violations of law complained of took place within the Southern District of New York.

5. The defendant Bangor Punta, directly and indirectly, made use of the mails and of the means or instruments of interstate commerce in connection with the acts and practices alleged herein.

6. On or about May 29, 1969, defendant Bangor Punta filed with the Commission a registration statement (including a prospectus) for a public offering of securities in connection with a proposed exchange offer for the common stock of Piper Aircraft Corporation ("Piper"). Said registration statement became effective on July 18, 1969, and Bangor Punta then caused prospectuses to be disseminated to all Piper shareholders.

7. Bangor Punta, through its exchange offer of July 1969, obtained 111,628 shares of Piper, or about 7% of the 1,644,790 shares of Piper common stock outstanding. Together with other acquisitions of Piper shares, Bangor Punta was able to obtain about 51% of the shares of common stock of Piper, while Chris-Craft Corporation, Bangor Punta's chief competitor for Piper since early 1969, acquired about 42% of Piper's common stock.

8. Bangor Punta's registration statement in connection with its exchange offer for Piper shares, and the prospectus included in the registration statement, discussed at considerable length the company's 98.7% owned subsidiary, the Bangor and Aroostook Railroad ("Railroad").

9. Bangor Punta's aforesaid registration statement and prospectus were materially deficient because they omitted to disclose the relevant facts concerning: (a) the company's firm general decision to sell the Railroad at a substantial loss over its carrying value on the books and financial statements of Bangor Punta; and (b) the company's specific decision to sell the Railroad to Amoskeag Company

("Amoskeag") at a $14,000,000 loss over the carrying value of the Railroad on Bangor Punta's financial statements.

10. When the Railroad sale to Amoskeag was formally concluded on October 2, 1969, the sales price of $5,000,000 resulted in an extraordinary loss of approximately $14,000,000, based on the carrying value of the Railroad on Bangor Punta's financial statements. The amount of this $14,000,000 loss far exceeded Bangor Punta's consolidated net income (before extraordinary items) of some $6,000,000 for the fiscal year ended September 30, 1969.

11. Bangor Punta filed said registration statement and prospectus for the exchange offer on May 29, 1969. During the two months preceding the filing these developments had occurred in regard to the sale of the Railroad:

(a) The board of directors of Bangor Punta had decided to dispose of the Railroad and had appointed a special committee of three of its members to study the alternatives. The basic reason for disposing of the Railroad was that in order to break even, it would require a heavy infusion of capital by Bangor Punta—perhaps as much as $5,000,000 over the next five years. In addition, the Railroad's earnings had been steadily deteriorating during the past three years.

(b) The special committee had decided upon sale of the Railroad as the only feasible alternative, and had obtained a tentative offer of $5,000,000 for its capital stock from Amoskeag, the only party known to have an interest in making the purchase.

(c) The Bangor Punta board of directors, after being informed of Amoskeag's tentative offer, authorized the chairman of the special committee, Curtis M. Hutchins:

(i) to negotiate with Amoskeag for its purchase of the capital stock of the Railroad for a total sum of $7,000,000, 51% to be purchased for some $3,250,000 and the remaining 49% to be optioned to Amoskeag at a higher price; and

(ii) to negotiate with Amoskeag for its purchase of 100% of the Railroad subject to further investigation of the accounting and tax ramifications of such a transaction and approval by the board of directors or the executive committee of the board.



(d) Hutchins, with the board's authorization in hand, communicated the $7,000,000 counter offer to Amoskeag, which flatly rejected it (as Hutchins had predicted to the Bangor Punta board). Hutchins then arrived at a written understanding with Amoskeag, subject to approval of the Bangor Punta board. The understanding, dated and hand delivered on May 27, 1969, called for the sale of all of the Railroad stock to Amoskeag for $5,000,000 (either in cash or in Bangor Punta securities held by Amoskeag, at Bangor Punta's option).

12. Two days after Hutchins' written understanding with Amoskeag, Bangor Punta filed with the Commission said registration statement and prospectus for the exchange offer. More than seven weeks elapsed between the filing of the registration statement and its effective date on July 18, 1969. During this period, the Bangor Punta board took no formal action with regard to the sale of the Railroad. Instead, Hutchins, on July 16, 1969, telephoned the president of Amoskeag—F. C. Dumaine, Jr.—and asked him to delay consummation of the Railroad sale in order to avoid disclosure of the transaction in Bangor Punta's pending registration statement. Dumaine prepared a memorandum to his files recording the substance of the conversation:

"Curtis Hutchins said we definitely have a deal—they are in registration—he hopes to be out of registration

in ten days—of course, that is questionable. He was informed by his lawyers that a definite commitment should not be made within two months of registration. We agreed that in the meantime I should go over the railroad with whomever I want to see the overall condition of the property and to meet the staff so that I will be prepared to select a staff on consummation date, if and when we have a consummation date."

13. In August 1969, prior to the time when Bangor Punta's board of directors formally approved the sale of the Railroad to Amoskeag for $5,000,000, John M. Coward presented an offer to Bangor Punta to buy the stock of the Railroad for $10,000,000 (payable $4,000,000 at closing and $1,000,000 per year for six years, with Bangor Punta to hold the stock as collateral and to collect interest at the prime rate on the unpaid balance). Bangor Punta rejected this offer because of its commitment to Amoskeag.

14. In September 1969, the Bangor Punta board of directors approved the $5,000,000 sale of the Railroad stock to Amoskeag. The formal agreement dated October 2, 1969, embodied the essential terms of Bangor Punta's written understanding with Amoskeag of May 27, 1969 (¶ 11(d), *supra*).

15. The Railroad sale and the resultant loss to Bangor Punta were material facts in the following respects, among others:

(a) *Large amount of loss and impact upon income.* In Bangor Punta's financial statements for the fiscal year ended September 30, 1969, the $14,000,000 loss on sale of the Railroad was deducted from earnings as an extraordinary loss item. Consolidated net income (after taxes) for that fiscal year, by way of contrast, was only about $6,000,000 (before the loss on sale of the Railroad), and for the six month period ended March 31, 1969, was $5,032,000. (The consolidated net income, after taxes, for prior fiscal years was: 1968—$8,244,000;



1967—$5,571,000; 1966—$5,569,000; 1965—$5,578,000; and 1964—$3,749,000.) Bangor Punta's net loss for the fiscal year ended September 30, 1969, was about $8,600,000.

(b) *Impact upon retained earnings and stockholders' equity.* The $14,000,000 loss comprised about 36% of Bangor Punta's retained earnings of some $38,000,000 as of the fiscal year beginning October 1, 1968, and also amounted to about 11% of stockholders' equity as of the same date.

(c) *Impact upon market price.* Immediately following both the announcement of sale of the Railroad, on October 3, 1969, and the release on December 2, 1969, of Bangor Punta's financial statements for fiscal 1969, Bangor Punta's common stock declined steadily on the New York Stock Exchange for at least a week (with one day's exception each period). During the period beginning October 3, 1969, through October 10, 1969, the market price for the common stock of Bangor Punta Corp. declined 4.6%. For the week beginning December 3 through the 10th, Bangor Punta common stock declined 13.6%.

(d) *Bangor Punta's contemporaneous opinion of the materiality of the Railroad sale.* Bangor Punta not only treated the Railroad at length on a going-concern basis in its registration statement but also assiduously strove to delay consummation of the Railroad sale until after conclusion of the exchange offer.

16. Defendant Bangor Punta violated section 17(a) of the Securities Act, 15 U.S.C. 77q(a), section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, by failing to disclose in its registration statement and prospectus facts concerning the disposition of the Railroad. Said omissions rendered materially misleading statements which were made concerning the business and financial condition of Bangor Punta.

17. Defendant Bangor Punta violated sections 7 and 10(a) of the Securities Act, 15 U.S.C. 77g and 77j(a), by reason of the failure of its registration statement and prospectus to disclose the company's intended cessation of its Railroad business and the consequences flowing therefrom.

18. Defendant Bangor Punta will, unless restrained and enjoined, continue to engage in the acts and practices set forth in this complaint and in acts and practices of similar purport. In fact, defendant Bangor Punta has demonstrated a propensity for violating the securities laws. The registration statement which is the subject of this action was filed by Bangor Punta pursuant to a permanent injunction obtained by the Commission against "gun jumping" violations by that company and Piper involving the registration provisions of the Securities Act, 15 U.S.C. 77e(c). *Securities and Exchange Commission* v. *Bangor Punta Corporation and Piper Aircraft Corporation*, Civil Action No. 1388-68 (D.D.C. 1969). The injunction, entered on May 26, 1969, upon consent of the defendants without admission of the allegations in the complaint, ordered Bangor Punta to file within 10 days a registration statement for the exchange offer for Piper shares or else discontinue the offering. The injunction, in relevant part, further ordered Bangor Punta not to "announce or implement any exchange offer unless and until such announcement of said exchange offer and the exchange offer comply with the registration provisions of the Federal securities laws." The court injunction notwithstanding, Bangor Punta proceeded to file a registration statement which failed in material respects to make the adequate disclosure required by the registration provisions of the securities laws. Moreover, as has been previously alleged (¶¶ 8, 11, 12), Bangor Punta's failure to disclose was made in a context which establishes unequivocally that the company itself regarded the omitted information to be material.



**WHEREFORE Plaintiff demands judgment:**

**1. Enjoining the defendant Bangor Punta from further acts and practices in violation of section 7 of the Securities Act, 15 U.S.C. 77g, and the rules and regulations thereunder; section 10(a) of the Securities Act, 15 U.S.C. 77j, and the rules and regulations thereunder; section 17(a) of the Securities Act, 15 U.S.C. 77q(a); and section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.**

**2. Ordering the defendant Bangor Punta to make an offer of rescission to all shareholders who exchanged shares of the common stock of Piper with Bangor Punta pursuant to the exchange offer of July 1969.**

**3. Awarding such other and further relief as the Court may deem just and proper.**

**KEVIN THOMAS DUFFY**
***Regional Administrator***
**Securities and Exchange Commission**
**New York Regional Office**
**26 Federal Plaza**
**New York, New York 10007**

**Respectfully submitted,**

**PHILIP A. LOOMIS, JR.**
***General Counsel***
**DAVID FERBER**
***Solicitor***
**ROBERT E. KUSHNER**
***Assistant General Counsel***
**JAMES J. SEXTON**
***Attorney***
**Securities and Exchange Commission**
**Washington, D. C. 20549**

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
*Plaintiff,*
*—against—*
BANGOR PUNTA CORPORATION,
*Defendant.*

70 Civ. 3490: MP

## ANSWER

The defendant, Bangor Punta Corporation ("Bangor Punta"), by its attorneys, Webster Sheffield Fleischmann Hitchcock & Brookfield, for its answer to the complaint herein alleges as follows:

FIRST: Denies each and every allegation contained in paragraphs "1" and "2" of the complaint.

SECOND: Denies each and every allegation contained in paragraph "3" of the complaint except Bangor Punta admits it is a corporation organized under the laws of the State of Delaware.

THIRD: Denies each and every allegation contained in paragraphs "4" and "5" of the complaint.

FOURTH: Denies each and every allegation contained in paragraph "7" of the complaint and affirmatively alleges that Bangor Punta acquired (a) 612,718 shares of Piper Aircraft Corporation ("Piper") common stock pursuant to the registered exchange offers it made to members of the Piper family and to all other holders of Piper common stock between July 18, 1969 and July 29, 1969; (b) 120,200 shares of Piper common stock purchased for cash in five unsolicited transactions off any registered stock exchange between May 14 and May 23, 1969; and (c) 100,614 shares of





Piper common stock purchased on the open market subsequent to August 8, 1969. Bangor Punta now owns of record a total of approximately 838,156 shares of Piper common stock of approximately fifty and seven-tenths of one percent (50.7%) of all the outstanding shares of Piper common stock. Further Bangor Punta has continued to purchase shares of Piper common stock on the open market from time to time. While Chris-Craft Industries, Inc. ("Chris-Craft") purports to own approximately 697,495 shares of Piper common stock, Bangor Punta claims Chris-Craft acquired such Piper shares in flagrant violation of the securities laws and is seeking appropriate relief against Chris-Craft in actions now pending in this Court.

FIFTH: Denies each and every allegation contained in paragraph "8" of the complaint and respectfully refers the Court to the registration statement and prospectus of Bangor Punta relating to the exchange offer for the contents thereof.

SIXTH: Denies each and every allegation contained in paragraph "9" of the complaint.

SEVENTH: Denies each and every allegation contained in paragraph "10" of the complaint and affirmatively alleges that on October 2, 1969, Bangor Punta sold all of the shares of capital stock of the Bangor & Aroostook Railroad Company ("BAR") owned by it to Amoskeag Corporation for $5,000,000 in cash, plus additional valuable cash considerations payable to Bangor Punta depending upon the occurrence of certain events in the future. For accounting purposes only (not cash purposes), Bangor Punta incurred an extraordinary loss of $13,813,289 before any consideration is given to the receipt of additional cash payments that may be received from Amoskeag Corporation under the terms of the sale.

EIGHTH: Denies each and every allegation contained in paragraph "11" of the complaint and affirmatively alleges that Bangor Punta filed a registration statement including a prospectus with the plaintiff for its exchange offers to the Piper family and all other holders of Piper common stock on May 29, 1969.

NINTH: Denies each and every allegation contained in paragraphs "12" and "13" of the complaint.

TENTH: Denies each and every allegation contained in paragraph "14" of the complaint and respectfully refers the Court to the several agreements dated October 2, 1969 between Bangor Punta and Amoskeag Corporation concerning the sale of the stock interests of Bangor Punta in the BAR to Amoskeag Corporation for the terms thereof.

ELEVENTH: Denies each and every allegation contained in paragraph "15" of the complaint and affirmatively alleges (a) that Bangor Punta incurred an extraordinary loss for accounting purposes (not cash loss) on October 2, 1969, of $13,813,289 as a result of its disposition of its stock interest in the BAR which had no impact or effect on Bangor Punta's earnings from its operation; (b) the extraordinary loss incurred had the effect of eliminating from the "retained earnings" item on the Bangor Punta balance sheet the extraordinary gain of $10,288,629 realized by Bangor Punta on September 30, 1965 when this investment of Bangor Punta in the BAR was increased on the balance sheet of Bangor Punta from $8,096,179 to $18,384,808 based on an appraisal of the then market value of the BAR shares. The foregoing information was fully disclosed to the public in the Bangor Punta and BAR financials incorporated in the prospectus for the exchange offer; (c) in fiscal 1968, the earnings of the BAR constituted less than one percent (1%) of the net earnings of Bangor Punta; and (d) on October 3, 1969, Bangor Punta common stock closed on the





New York Stock Exchange at $21 per share and between such date and October 10, 1969, Bangor Punta common stock closed between 21⅜ and 20⅛; and that between October 11 and October 21, 1969, after the news of the sale of the BAR by Bangor Punta had been fully assimilated by the investment community, Bangor Punta common stock closed between 22 and 24⅞, for an increase in value of the common stock of Bangor Punta of almost twenty percent (20%). Beginning in early 1969 and continuing throughout 1969, it is common knowledge that the prices of common stocks generally declined markedly as a result of a number of factors including by December, 1969, tax selling. Although Bangor Punta common stock closed at 18⅜ on December 3, 1969 and at 15⅞ on December 10, 1969 and remained in the $15 range through December, 1969, by January 5, 1970, Bangor Punta common stock again closed at 18⅝.

TWELFTH: Denies each and every allegation contained in paragraphs "16", "17" and "18" of the complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

THIRTEENTH: The complaint herein is sham and false because there is no good ground to support the allegations of the complaint within the meaning of F.R.C.P. Rule 11. If Bangor Punta can establish that this action was commenced by the plaintiff without good cause, Bangor Punta may be entitled to be reimbursed for all its counsel fees and other direct and indirect expenses incurred in defending itself.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

FOURTEENTH: Upon information and belief, since May, 1969, the administrative staff of the plaintiff has been engaged in a course of conduct, the intended result of which is to interfere on behalf of Chris-Craft in the corporate struggle for control of Piper that has been going on between Bangor Punta and Chris-Craft since May, 1969. These

wrongful activities of the administrative staff of the plaintiff may have been prompted by, or be the result of their own internal confusion and error. As a result of such internal confusion and error the administrative staff may believe they have afforded inequitable treatment to Chris-Craft in its fight for control of Piper in the spring of 1969, and are attempting to correct the effects of their actions by attempting unjustly to make Bangor Punta suffer for the administrative staff's own failures. If such improper motives are established from evidence developed in discovery proceedings herein, in addition to constituting the equitable defense of "unclean hands" on the part of the plaintiff, Bangor Punta may be entitled to affirmative injunctive relief against continued interference by the administrative staff of plaintiff with the affairs of Bangor Punta.

WHEREFORE Bangor Punta demands that the complaint herein be dismissed with prejudice, that it be awarded a judgment against the plaintiff for its counsel fees and all other direct and indirect expenses including costs and disbursements incurred by it in defending this action, and for such other and further relief as this Court deems proper in the premises.

Dated: New York, New York
October 14, 1970

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD

By JAMES V. RYAN

James V. Ryan
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